

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA COSTA,
MARIN COUNTY FEDERATION OF COMMUTERS
CLUBS, AND CONTRA COSTA COUNTY COM-
MUTERS ASSOCIATION, APPELLANTS,

UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION, GOLDEN GATE TRANSIT
LINES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

FILED AUGUST 30, 1957*

PROBABLE JURISDICTION NOTED NOVEMBER 12, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA COSTA,
MARIN COUNTY FEDERATION OF COMMUTERS
CLUBS, AND CONTRA COSTA COUNTY COM-
MUTERS ASSOCIATION, APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION, GOLDEN GATE TRANSIT
LINES, ET AL.

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NORTHERN DISTRICT OF CALIFORNIA

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[fol. 1]

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**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION**

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN
COUNTY FEDERATION OF COMMUTER CLUBS, CONTRA COSTA
COUNTY COMMUTERS ASSOCIATION, and AMALGAMATED
ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR
COACH EMPLOYEES OF AMERICA, Divisions 1055, 1222,
1223, 1225, and 1471, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION, Defendants.

Civil Action No. 34985

COMPLAINT TO ANNUL ORDER OF INTERSTATE COMMERCE
COMMISSION—Filed October 18, 1955

Plaintiffs named above allege as follows:

I.

County of Marin is a political subdivision of the State of California, within the Northern Judicial District of California; County of Contra Costa is a political subdivision of the State of California, within the Northern Judicial District of California; Marin County Federation of Commuter Clubs is an unincorporated association consisting of various commuter organizations whose members regularly use the bus services of Pacific Greyhound Lines [fol. 2] between various points in the County of Marin and the City and County of San Francisco, and its principal office is in the County of Marin, State of California; Contra Costa County Commuters Association is a non-profit corporation organized under the laws of the State of California, with its principal office in the County of

Contra Costa, State of California, whose members regularly use the bus services of Pacific Greyhound Lines between various points in the County of Contra Costa, on the one hand, and the City and County of San Francisco, and the cities of Oakland and Berkeley, on the other hand; Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Divisions 1055, 1222, 1223, 1225, and 1471, hereinafter called the Union, is a labor organization (sic) affiliated with the American Federation of Labor, some of whose members are employed by Pacific Greyhound Lines in various capacities in connection with the bus service performed by Pacific Greyhound Lines between the City and County of San Francisco, on the one hand, and points in Marin County, State of California, on the other hand; between the City and County of San Francisco, and the cities of Oakland and Berkeley, on the one hand, and points in Contra Costa County, State of California, on the other hand; and between the City and County of San Francisco, on the one hand, and points in San Mateo and Santa Clara Counties, State of California, on the other hand.

II.

Pacific Greyhound Lines is a corporation organized and existing under the laws of the State of California and is engaged as a common carrier in the transportation of persons in interstate commerce by motor vehicle within the meaning of Section 203(14) and (16) of the Interstate Commerce Act, and is also engaged as a common carrier for compensation in the ownership, control, operation, and [fol. 3] management of passenger stages in intrastate commerce over public highways between fixed termini and over regular routes in the State of California within the meaning of Section 226 of the Public Utilities Code of the State of California. Pacific Greyhound Lines performs such transportation service for the transportation of passengers in interstate commerce and in intrastate commerce between the following points and in the following areas (among others), pursuant to various certificates of public convenience and necessity issued to it by the Interstate Commerce Commission (with respect to inter-

state commerce) and by the Public Utilities Commission of the State of California (with respect to intrastate commerce):

- (a) Between the City and County of San Francisco, State of California, on the one hand, and various points in the County of Marin, State of California, on the other hand, and between various points within the County of Marin;
- (b) Between the City and County of San Francisco, and the cities of Oakland and Berkeley, State of California, on the one hand, and various points in Contra Costa County, State of California, on the other hand; and
- (c) Between the City and County of San Francisco, State of California, on the one hand, and various points in the Counties of San Mateo and Santa Clara, State of California, on the other hand.

Inssofar as the operations which are material to this proceeding are concerned, approximately six per cent of the total revenue is derived from the transportation of passengers in interstate commerce and approximately 94 per cent of the total revenue is derived from the transportation of passengers in intrastate commerce. Said operations consist almost completely of local bus service within the metropolitan area surrounding San Francisco Bay.

[fol. 4]

III.

Golden Gate Transit Lines is a corporation organized under the laws of the State of California on May 7, 1953. It engages in no business activities and is not now, and never has been, engaged in any operations as a motor carrier within the meaning of either the Interstate Commerce Act or the Public Utilities Code of the State of California.

IV.

The Greyhound Corporation of Chicago, Ill., hereinafter called Greyhound Corporation, is a corporation organized

and existing under the laws of the State of Delaware and controls Pacific Greyhound Lines through ownership of approximately 98 per cent of the outstanding common stock and approximately 64 per cent of the outstanding preferred stock of Pacific Greyhound Lines. Greyhound Corporation is the parent company of a nationwide system of motor bus transportation which includes various subsidiaries in addition to Pacific Greyhound Lines.

V.

On or about February 8, 1954, Pacific Greyhound Lines, Golden Gate Transit Lines, and Greyhound Corporation filed with the Interstate Commerce Commission a joint application (to which the Interstate Commerce Commission assigned docket No. MC-F-5643) in which authority was requested under Section 5 of the Interstate Commerce Act (a) for Pacific Greyhound Lines to acquire control of Golden Gate Transit Lines through ownership of all of the outstanding capital stock of the latter, (b) for the contemporaneous purchase by Golden Gate Transit Lines of certain operating rights and property of Pacific Greyhound Lines in exchange for the outstanding capital stock of Golden Gate Transit Lines, and (c) for the acquisition of concurrent control by Greyhound Corporation of Golden Gate Transit Lines and of the operating rights and properties to be acquired by the latter. Included in the operating rights sought to be transferred to Golden Gate Transit Lines in said application are various certificates of public convenience and necessity issued by the Public Utilities Commission of the State of California authorizing Pacific Greyhound Lines to engage in passenger stage operations (as defined in Sections 225 and 226 of the Public Utilities Code of the State of California) for the transportation of passengers by motor vehicle in intrastate commerce between the points and areas described in paragraph II, above.

VI.

The Interstate Commerce Commission conducted a public hearing on said application before Examiner Irving R.

Raley in San Francisco, California, on April 13 and 14, 1954, and plaintiffs named above appeared at such hearing and participated therein as protestants, and objected to the granting of said application on the grounds that the proposed transaction (a) was not within the scope of Section 5 of the Interstate Commerce Act and (b) was not consistent with the public interest. Thereafter, on or about October 20, 1954, said Examiner issued his proposed report recommending denial of said application.

VII.

On July 6, 1955, the Interstate Commerce Commission issued its Report and Order in said matter, in which, contrary to the proposed report of said Examiner, it granted said application subject to the terms and conditions set forth in the Order. A copy of said Report is attached hereto as Exhibit A, and a copy of said Order is attached hereto as Exhibit B.

[fol. 6]

VIII.

On or about August 11, 1955, plaintiffs named above filed with the Interstate Commerce Commission their petitions for rehearing and reconsideration of said decision and order of July 6, 1955, in which they urged the same grounds set forth above in Paragraph VI and requested an opportunity to present further evidence. Said petitions were denied by the Interstate Commerce Commission on September 19, 1955, by an order, a copy of which is attached hereto as Exhibit C. By its further order dated September 27, 1955, a copy of which is attached hereto as Exhibit D, the Interstate Commerce Commission postponed the effective date of said Order of July 6, 1955, to October 19, 1955.

IX.

This action is brought to suspend, enjoin, annul, and set aside said Report and Order of the Interstate Commerce Commission dated July 6, 1955. Jurisdiction and venue of this Court are based upon the provisions of United States Code, Title 28, Section 1336, 1398, and 2321 to 2325,

inclusive. Plaintiffs are informed and believe that Pacific Greyhound Lines, Golden Gate Transit Lines, and Greyhound Corporation have not as yet taken any steps to effectuate the transfers authorized by said Order of the Interstate Commerce Commission, and for that reason plaintiffs are not seeking a restraining order or interlocutory injunction at this time. In the event Pacific Greyhound Lines, Golden Gate Transit Lines, or Greyhound Corporation should hereafter attempt to carry out any provision of said Order during the pendency of this action, plaintiffs request leave to present to the Court at that time an application for a temporary restraining order or an interlocutory injunction, or both, to stay and suspend the operation of said order until final hearing and de-[fol. 7] termination of this action and to present to the Court in connection therewith such supplemental pleadings and motions as may be appropriate.

X.

The findings and conclusions of the Interstate Commerce Commission as set forth in said Report and Order of July 6, 1955, are erroneous and contrary to law; and said Order is invalid and illegal, for the following reasons:

- (a) The transactions described in said application and authorized in said Order are not within the scope of Section 5 of the Interstate Commerce Act, and particularly of subdivision (2)(a) thereof;
- (b) Golden Gate Transit Lines is not a "carrier" within the meaning of that term as used in Section 5(2)(a) of the Interstate Commerce Act;
- (c) The transactions described in said application and authorized in said Order do not involve
 - (1) the consolidation or merger of the properties or franchise of two or more carriers, or
 - (2) the purchase, lease, or operation by one carrier, or two or more carriers jointly, of the properties of another carrier, or

- (3) the acquisition, by one carrier, or two or more carriers jointly, of the control of another carrier, or
- (4) the acquisition by a person which is not a carrier of control of two or more carriers, or
- (5) the acquisition by a person which is not a carrier, but has control of one or more carriers, of control of another carrier.

WHEREFORE, plaintiffs pray as follows:

1. That this cause be heard by a three-judge court as [fol. 8] provided in Sections 2284 and 2325, Title 28, of the United States Code;

2. That this Court issue its order permanently suspending, enjoining, annulling, and setting aside the Report and Order of the Interstate Commerce Commission dated July 6, 1955, and more particularly described in the foregoing complaint;

3. That, in the event of subsequent application therefore, this Court issue a temporary restraining order, or an interlocutory injunction, or both, staying and suspending the operation of said Report and Order pending the final hearing and determination of this action; and

4. That plaintiffs have such other relief as the Court may deem appropriate.

Respectfully submitted,

/s/ Spurgeon Avakian, Financial Center Building,
Oakland 12, California; /s/ Jack Robertson,
Keating Building, Menlo Park, California; Attorneys for Plaintiffs:

W. O. Weissich, District Attorney, Marin County,
San Rafael, California; Francis W. Collins, District Attorney, Contra Costa County, Martinez, California, Of Counsel.

October 18, 1955.

[fol. 9] EXHIBIT "A" TO COMPLAINT
INTERSTATE COMMERCE COMMISSION

—
No. MC-F-5643¹

THE GREYHOUND CORPORATION—CONTROL; PACIFIC GREY-
HOUND LINES—CONTROL; GOLDEN GATE TRANSIT LINES—
PURCHASE (PORTION)—PACIFIC GREYHOUND LINES

Submitted March 16, 1955.

Decided July 6, 1955.

1. Application of Pacific Greyhound Lines for authority to acquire control of Golden Gate Transit Lines through ownership of capital stock and for the contemporaneous acquisition by Golden Gate Transit Lines of certain operating rights and property of Pacific; and of The Greyhound Corporation to acquire control of Golden Gate Transit Lines through stock ownership, and of the operating rights and property through the transaction, approved and authorized, subject to conditions.
2. Application by Pacific Greyhound Lines for a certificate of public convenience and necessity authorizing continuance of operations by it in interstate or foreign commerce between certain points in California, granted.

Allen P. Matthew and Gerald H. Trautman for applicants.

Spurgeon Avakian and Jack Robertson for protestants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by applicants and by the protesting labor union to the examiner's proposed report which

¹ This report embraces No. MC-1511 (Sub-No. 103), Pacific Greyhound Lines, San Francisco, Calif.

recommended denial of the applications, and a reply to applicants' exceptions was filed collectively by the other protestants. Pursuant to applicants' request, oral argument was heard on March 16, 1955, in which applicants and all protestants participated. Our conclusions differ from those of the examiner.

By joint applications filed February 8, 1954, as amended, Pacific Greyhound Lines and Golden Gate Transit Lines, both of San Francisco, Calif., herein called Pacific and [fol. 10] Golden Gate, respectively, seek authority under section 5 of the Interstate Commerce Act (1) for Pacific to acquire control of Golden Gate through ownership of all its outstanding capital stock, and (2) for the contemporaneous acquisition by Golden Gate of certain operating rights and property of Pacific. The Greyhound Corporation of Chicago, Ill., herein called Greyhound, which controls Pacific through ownership of a majority of its outstanding common capital stock² has joined in the application and seeks authority to acquire concurrent control of Golden Gate and of the operating rights and properties through the transaction. In a separate application, as a matter directly related to the applications under section 5, Pacific, in No. MC-1511 (Sub-No. 103), as amended, seeks a certificate of public convenience and necessity authorizing continuance of operations by it in interstate or foreign commerce between certain points in California, over portions of the routes over which Golden Gate would operate as a result of the purchase. The joint board having waived participation in No. MC-1511 (Sub-No. 103), a consolidated hearing was held before the examiner, at which Divisions

² See the report in Finance Docket No. 18382, *The Greyhound Corporation Securities*, I.C.C., decided April 22, 1954, for a discussion of certain financing plans in furtherance of Greyhound's long-range program to integrate into its organization 8 of its bus operating subsidiaries, including Pacific, and also 2 companies in which Greyhound owns no stock. In the pending application in No. MC-F-573, *The Greyhound Corporation—Merger—Pacific Greyhound Lines; Control—California Parlor Car Tours Co.*, the merger of Pacific into Greyhound is proposed. That application reflects ownership by Greyhound as of November 12, 1954, of 97.8 percent of the outstanding common stock and 63.9 percent of the outstanding preferred stock of Pacific.

1055, 1222, 1223, 1224, and 1471, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, herein called the Union, the counties of Marin and Contra Costa in California, herein collectively called [fol. 11] the Counties, the Federation of Marin County Commuter Clubs, and the Contra Costa County Commuters Association, the last two herein collectively called the Commuter Associations, opposed the applications. Greyhound and Pacific operate substantially more than 20 motor vehicles.

Greyhound, a Delaware corporation, is the parent company of the nationwide system of motor bus transportation. It operates in interstate or foreign commerce as a motor common carrier of passengers over regular routes through the medium of autonomous operating divisions, which form integrated operating units within the company, and it controls a number of separate operating subsidiary corporations. It also controls several terminal, garage, and other noncarrier companies. Greyhound's outstanding capital stock is widely distributed, the 10 principal stockholders owning and holding for the benefit of others, in the aggregate, 9.49 percent of the common voting stock as of March 2, 1953, the largest block of which constitutes 3.53 percent.

Pacific³ operates as a motor common carrier of passengers between points in California, Oregon, Nevada, Utah, Texas, Arizona, and New Mexico.⁴ It conducts intercity operations over routes between Astoria, Oreg., and San Diego, Calif.; between San Francisco and Salt Lake City, Utah; between Los Angeles and Albuquerque, N. Mex.; and between Los Angeles and El Paso, Tex. In [fol. 12] combination with other members of the Grey-

³ Pacific holds 100 percent of the stock of California Parlor Car Tours Company, which conducts a touring service between San Francisco and certain points in California, Reno, Nev., and Grants Pass, Oreg.

⁴ Its interstate operations are conducted pursuant to certificates issued in No. MC-1511 and subnumbered proceedings. Pacific has pending, in No. MC-1511 (Sub-No. 102), an application for a certificate consolidating and superseding all of its presently outstanding separate certificates.

hound system and with other bus lines, Pacific has been providing joint through service between San Francisco, on the one hand, and, on the other, Seattle, Spokane, Chicago, St. Louis, and Boise; and between Los Angeles, on the one hand, and, on the other, Seattle, Chicago, San Diego, Memphis and New Orleans.

Pacific conducts extensive intrastate operations in California, and provides commutation or "mass transportation" service in and around the San Francisco Bay area under certificates issued by the California Commission, over routes embraced also in certificates issued by this Commission covering its interstate operations. These commuter operations cover distances up to 25 or 30 miles, radiating from San Francisco to the suburban area, north into Marin County, south on the Peninsula, and east into Contra Costa County. More specifically, the Marin County service includes Stinson Beach, Sausalito, Marin City, Mill Valley, Corte Madera, Larkspur, San Rafael, Ross, San Anselmo, Fairfax, Hamilton Field, Inverness, Bolinas, and Novato; the Contra Costa operation extends from San Francisco and Oakland and includes Berkeley, Martinez, Port Chicago, Orinda Corners, Lafayette, Walnut Creek, Concord, Camp Stoneman, Crystal Pool, Monument, Pittsburg, Antioch, Danville, and Dublin; and the Peninsula and Half Moon Bay operations include South San Francisco, San Francisco Airport, San Bruno, Millbrae, Burlingame, Belmont, San Carlos, San Mateo, Redwood City, Menlo Park, Bellhaven, Palo Alto, Sharp Park, Rockaway Beach, Montara, El Granada, and Half Moon Bay. The local operations represent 3.08 percent of Pacific's total route miles, account for 7.44 percent of its bus miles operated, and produce 9.16 percent of its gross [fol. 13] passenger revenue; but they account for 35.49 percent of the total number of passengers transported by Pacific. Marin County has a population of about 100,000, the area served in Contra Costa County, 60,000,⁵ and the Peninsula 250,000.

Golden Gate, which was incorporated on May 7, 1953, has engaged in no business activities and is not now a

⁵ The Rand McNally Road Atlas shows the population of Contra Costa County for 1950 as 298,984.

motor carrier. Pursuant to an agreement entered into on January 27, 1954, and a supplemental agreement of April 8, 1954, between Pacific and Golden Gate, the latter would acquire from the former, with the exception of authority over an alternate route between Danville and Dublin, over California Highway 21, which applicants request be canceled, the above-described interstate and intrastate operating rights of Pacific in the San Francisco Bay area, including intrastate authority within the cities of San Francisco, Oakland, Pittsburg, and Berkeley essential for operations in connection with the routes purchased. The interstate operating rights to be acquired are specifically set forth in Appendix A hereto, and our findings will be conditioned to cancel the operating rights over the alternate route mentioned. Golden Gate would also receive from Pacific \$150,000 in cash, 52 buses recently purchased by Pacific under conditional sales contracts, 138 transit-type buses, and fare boxes used in the operations, and it would acquire Pacific's rights and assume its obligations in certain leaseholds and other contracts pertaining to the commuter operations. In payment therefor, Golden Gate would issue to Pacific all of its capital stock, consisting of 300,000 shares of \$1 par value common, assume the outstanding indebtedness on the 52 buses, and it would be obligated to pay to Pacific the difference between such indebtedness and the net book value of the buses at the date of consummation. The amount of the difference would be carried by Golden Gate as an open account indebtedness to be repaid to Pacific as it is able to do so.

Principally in order to continue utilizing the routes in its long-haul interstate service, over which Golden Gate would render the commuter service as a result of this transaction, Pacific requests, in No. MC-1511 (Sub-No. 103), that a certificate be issued to it authorizing the transportation of passengers and their baggage, and express, mail, and newspapers, in the same vehicle with passengers, in the Marin County area between Novato and San Francisco; in the Contra Costa County area between San Francisco and Oakland, between Port Chicago and Antioch via Pittsburg, between Pittsburg and Antioch via Camp Stoneman, and between Martinez Junction and Camp

Stoneman, via Concord Junction and Camp Stoneman Junction; and in the Peninsula area between San Francisco and Palo Alto, via San Mateo and also via Bellehaven, between San Francisco and Half Moon Bay, and between Half Moon Bay Junction and Crystal Springs Dam, with the latter two routes restricted to service during the summer months. Pacific would serve all intermediate points on these routes except those on the segment between Free-way Junction and Airport Overpass, which is southwest of San Francisco International Airport. With a few exceptions, the authority sought by Pacific in No. Mc-1511 (Sub-No. 103), duplicates and constitutes part of the routes which Golden Gate would acquire in No. MC-F-5643. As long as it is able to secure access into and out of San Francisco on its long-haul operations, Pacific would accept any restriction that might be imposed.

[fol. 15] Golden Gate would operate under the same schedules now observed by Pacific. If necessary in the performance of the "local" service, Pacific would lease additional buses, up to 100, to Golden Gate at a rental based on the actual cost to Pacific of supplying the buses, including depreciation and a return on investment. Those terminals handling a preponderance of local traffic would be transferred to Golden Gate. Those terminals owned by Pacific, such as the ones at San Rafael and Palo Alto, would be leased to Golden Gate at a rental covering depreciation, taxes, and return on investment, and Pacific's leases on terminals such as those at Redwood City, San Mateo, and the San Francisco Ferry Building terminal, the latter exclusively used for commutation purposes, would be assumed by Golden Gate. Pacific would pay for its continued use of the first four terminals on a commission basis, Golden Gate would operate from Pacific's terminal at Oakland on a commission basis, and a portion of the cost of operating Pacific's San Francisco Seventh Street terminal would be allocated to Golden Gate on a trip basis. Charges, consisting of rentals, taxes, and insurance, to be assumed by Golden Gate with respect to terminal facilities aggregated approximately \$26,500 a year as of April 14, 1954.

Pacific's servicing and maintenance facilities in San Francisco would be available to Golden Gate on a joint facility basis, with Golden Gate responsible for direct [fol. 16] costs and its allocable share of overhead expenses. Gasoline and oil would be furnished at cost. Golden Gate's offices would be located temporarily at the Seventh Street terminal in San Francisco, and it would be free to change any existing arrangements with respect to terminal, maintenance or other facilities. Golden Gate would have a separate management under a president or manager skilled in mass transportation. However, Pacific's representatives would at all times constitute a majority of Golden Gate's board of directors, although none would be directors of Pacific, and the board would include a representative from each of the areas served who would give particular consideration to the problems of his specific area.

Golden Gate would hire those employees of Pacific directly engaged in the local services who desire to transfer, and would assume all of Pacific's obligations to such employees under the terms of the collective bargaining agreement now in effect between Pacific and the Union. Pacific claims there would be no loss of employment. It is expected that approximately 310 drivers, 11 station employees, 13 supervisors and between 10 and 20 accounting and clerical employees would be transferred to Golden Gate. Pacific is willing to accept such protective conditions for employees as we may impose, but the Union has not indicated any withdrawal of its opposition by reason of this statement by Pacific.

Under the agreement between the parties, Pacific would not conduct any "local" services in the area except that it would transport passengers moving in interstate commerce on its through buses over its retained routes. In other words, where permitted by the rights, applicants would have an arrangement for the optional honoring of interstate tickets in any area where a better service could be [fol. 17] provided through such an arrangement. A joint fare arrangement between Golden Gate and Pacific is also contemplated to facilitate transfers of passengers at connecting points, although from past experience, it is not anticipated that such interline traffic would be substantial.

Pacific would not transport any passengers in intrastate commerce over Golden Gate's routes, ~~except to or from points beyond.~~ It will be noted that this entails the transfer to Golden Gate of intrastate operating rights over the routes indicated, and the retention by Pacific of authority to transport intrastate traffic over certain of the same routes in its long-haul operations—somewhat similar to the proposal for the transportation of interstate traffic, which occasioned the filing of the application in No. MC-1511 (Sub-No. 103). There is some question in the record as to whether Pacific would continue to hold intrastate rights between Redwood City and San Francisco. However, Pacific would continue to hold intrastate rights, duplicating portions of intrastate authority being transferred to Golden Gate, within the cities of San Francisco, Oakland and Pittsburg over routes considered essential for the conduct of its intercity operations.

In addition to those routes over which Pacific would continue to operate in interstate commerce, transporting passengers between the same points, there is, and would continue to be, traffic in interstate commerce to and from points on routes which would be served only by Golden Gate, and as illustrative of this, the evidence shows that during the month of October 1953, 60 passengers purchased tickets at such points in Marin County (11 at Sausalito, 9 at Mill Valley, 3 at Fairfax, 13 at San Anselmo, 14 at Marin City, and 10 at Hamilton Field), for revenue of [fol. 18] \$1,656; 36 at points in the Peninsula area (12 at San Bruno, 22 at Burlingame-Howard, and 2 at Millbrae), for revenue of \$642; and 54 at points in Contra Costa County (8 at Lafayette, 22 at Walnut Creek, 1 at Monument, and 23 at Concord), for revenue of \$1,175; or a total of 150 passengers and \$3,473. This compares with additional interstate tickets purchased during the same month by 523 passengers, for total revenues of \$13,980, at stations, other than San Francisco and Oakland, to be served by both Golden Gate and Pacific.* It is estimated that if

* The above figures for October 1953 show ticket sales outbound from the given points. However, it is estimated that the volume of interstate traffic flowing into the territory is approximately the same.

Golden Gate had operated over the considered routes for the entire year 1953, it would have received \$3,694,600 in passenger revenue from both its interstate and intrastate traffic.

Pacific's balance sheet as of October 31, 1953, shows the following:

<i>Assets</i>	
Current	
Cash	\$1,510,658
Temporary cash investments	4,842,189
Accounts receivable (net)	1,904,945
Material and supplies	562,762
	<u>\$ 8,820,554</u>
Tangible property, less depreciation	18,163,410
Intangible Property (net)	3,890,368
Investment securities and advances	
Associated and subsidiary companies	\$ 657,633
Other	184,034
	<u>841,667</u>
Special funds	6,707,017
Deferred debits	281,526
	<u></u>
Total assets	<u><u>\$38,704,542</u></u>
<i>Liabilities</i>	
Current	
Accounts payable	\$6,729,335
Taxes accrued	4,817,224
Other current liabilities	668,681
	<u>\$12,215,240</u>
Advances payable	55,397
Equipment obligations	66,299
Deferred credits	49,462
Reserves	3,291,194
Capital stock	14,595,000
Earned surplus	8,431,950
	<u></u>
Total liabilities	<u><u>\$38,704,542</u></u>

Income statements

	<i>Net Income</i>	
	<i>Before Taxes</i>	<i>After Taxes</i>
1951	\$7,289,617	\$3,368,751
1952	6,506,374	3,303,874
1953 (first 10 months)	6,973,269	2,980,269

Golden Gate's balance sheet giving effect to the proposed transaction as of April 1, 1954, would have shown assets aggregating \$1,455,960, consisting of \$150,000 in cash, the 52 new buses, 138 additional buses, and 194 cash fare boxes, having net book values of \$1,155,960, \$130,537, and \$19,461, respectively, and intangible property \$2. Its liabilities⁷ would have consisted of equipment obligations totaling \$982,566 on the 52 buses, represented by conditional sales contracts to be assigned to Golden Gate, payable in 24 quarterly installments at 3 $\frac{1}{4}$ percent interest on the unpaid balance, with \$163,761 due within one year and \$818,805 [fol. 20] due after one year; open account indebtedness of \$173,394 to reimburse Pacific for its payments on the new buses; and \$300,000 in par value common stock to be issued to Pacific.

A pro forma income statement shows that if Golden Gate had conducted the "local" services, it would have had an estimated net operating loss of \$234,300 for 1953 under then existing effective fares. At the time of the hearing Pacific had pending an application before the California Commission, filed on May 18, 1953, seeking an increase in its fares for operations in the Marin County area and, to a much smaller extent, in another county not here involved. Applicants estimated that the granting of the requested increase would provide additional annual revenue to Golden Gate of \$254,000, thus changing Golden Gate's estimated deficit into an estimated net income of \$19,700. However, since issuance of the proposed report, the California Commission, on November 4, 1954, authorized an increase which, according to the report of the California Commission attached to applicant's exceptions, will produce estimated

⁷ Golden Gate would assume no obligations and would issue no notes or other securities within the meaning of section 214.

additional revenue of about \$84,000 a year. The California Commission, in granting that increase, recognized that if the then existing fares were continued during the year ending June 30, 1955, an estimated loss of \$389,800 would be sustained for the Marin County operations, and that Pacific's losses for its overall California intrastate operations would be \$1,202,200.⁸ The California Commission explained that although the granted increase still would not provide sufficient revenue to cover the cost of the Marin County operations, a sharp increase as proposed by Pacific would also fail to place the Marin County operations on a self-sustaining basis, because the law of diminishing returns would cause diversion from Pacific of a substantial part of its commutation patronage. To the extent this additional revenue may be applicable to the Marin County operations, the proportion or amount of which is not indicated, Golden Gate's estimated deficit would be decreased.⁹

The operations which Golden Gate would acquire involve the transportation, over short distances, principally of daily commutation passengers at special fares, with the peak traffic volume being inbound to San Francisco between the hours of 7 a.m. and 9 a.m., and outbound between the hours of 4:30 p.m. and 6:30 p.m. In the case of Marin [fol. 21] County traffic, 90 transit-type buses are operated by Pacific during a peak period, whereas service on that route during the balance of the day requires only 19 buses, the remaining buses and drivers being idle during the off-peak period. The Contra Costa operation is similar to the Marin County service, although the traffic volume is not as great. The Peninsula traffic is subject to less pronounced peaks because the Southern Pacific Railroad provides for the great bulk of the commutation service in that area. In contrast to the mass transportation problem, Pacific's intercity or mainline traffic does not consist of

⁸ This figure includes consideration of a downward trend of traffic among other things.

⁹ Counsel for Pacific stated at the oral argument that a petition for rehearing has been filed in that proceeding, and also that an application for an increase in fares on the Peninsula had been filed with the California Commission.

regular daily passengers, the usual one-way and round-trip fares are charged instead of reduced commutation fares, longer trips are involved, and mainline equipment is utilized. A single contract with the Union covers employees of both the "local" and long-distance services, although it includes separate sections that apply specifically to the different services, one of the principal differences being the payment of mainline drivers generally on a mileage basis, whereas "local" drivers are paid on an hourly basis. No other company in the Greyhound system operates a commutation service of the character or magnitude of that existing in the San Francisco Bay area and Pacific has no comparable "local" or commutation service in any other area.

To show that the transaction would be consistent with the public interest, applicants submitted evidence concerning certain historical "problems" which, they contend, would be solved by this proposal. It appears that prior to the recently authorized increase, only minor adjustments had been made in the commutation fares since 1940 or 1941, despite an increase, according to Pacific, of over 100 percent in the cost of providing the service; and during [fol. 22] 1953, Pacific sustained a deficit of \$234,300 in conducting these operations. On the other hand, Pacific contends that the fares of two other commutation services, operating in the San Francisco and Los Angeles areas, have been increased by over 100 percent since 1941. This depressed fare structure, applicants maintain, has resulted in a loss of practically all of Pacific's capital investment in the local operations, and losses in Marin County operations alone have exceeded \$2,000,000 since inception of that service in 1941. Pacific attributes this situation to the rate-making policy of the California Commission, which the commuter organizations defend. Pacific contends that this policy has required the subsidization of the services under these commutation fares by the revenue from the systemwide intercity operations, without regard to the circumstances and costs of the "local" operations, and that this has seriously affected its ability to compete in the face of a declining traffic volume. The insistence by the California Commission upon the preparation and sub-

mission of systemwide statistics and accounting in the determination of proceedings involving the "local" commutation fares has increased Pacific's costs and required the maintenance of records and statistics, which, applicants contend, could be eliminated under the proposed separation, resulting in substantial savings. Applicants further submit that in addition to the savings resulting from the simplification of rate proceedings and maintenance of records, other savings, such as in station and insurance expense, may be realized by the separation because of operational and managerial improvements and abandonment of mainline carrier practices in the local operations.

Applicants emphasize that the proposed separation will effectively resolve existing problems of management. While Pacific's long-haul operations are the source of its financial strength, producing 90 percent of the system revenue, the exacting demands of the commuters have caused its president to devote 15 percent of his time to the "local" operations, its auditor and his staff 70 percent, and its vice president in charge of operations 25 percent.

In order to advise and assist Pacific in the organization of Golden Gate, to select the management for the latter and to recommend policies in the operations of a truly suburban service by Golden Gate, Pacific has engaged an expert with 30 years' experience in local transit operations. He expressed the opinion that there should be a complete separation since the service which Golden Gate would render is distinct, from an economic and traffic standpoint, from that which Pacific would continue; and that the proposed operation by Golden Gate is entirely feasible and would be more easily adaptable to the special needs of its patrons and to integration with local activities and overall planning.¹⁰ He stated that the interests of Pacific's

¹⁰ The California State legislature has appropriated funds for a survey of the transportation system in the area, and it is contemplated that a San Francisco Bay Area Rapid Transit District will be established to relieve traffic congestion. All the territories to be served by Golden Gate are within the boundaries of the proposed transit district, and it is expected that the "local" operations would be integrated into, and supplement other services in, such a transit

management lie elsewhere; that the management problem will not be solved unless a separate corporation is set up because "you can't serve two masters"; that establishment of a separate management in charge of local operations subject only to supervision by Pacific's board of directors, which would not be "local" minded, is impractical; and that Golden Gate should have a separate board of directors, a majority of which should be local representatives from the areas served.

[fol. 24] Part of the over-all management problem is that of labor-management relations which, although strongly disputed by the Union, applicants contend would benefit from the proposed separation of the operations. The negotiation of employment contracts with the Union in the past has been made especially difficult because the terms applicable to the two classes of drivers have been embraced in a single labor agreement, even though the operating practices have been different. As an illustration, the current agreement was negotiated following settlement of a strike which forced suspension of Pacific's entire operations for 79 days, the principal issue being the Union's demand for a five-day week for the mainline drivers, based on the fact that the "local" drivers were granted a 5-day week, thus making Pacific the first major motorbus carrier in the United States to make such a concession. In addition, Pacific claims that the ill will engendered by the unfavorable publicity incident to its "local" difficulties has reflected upon its reputation and has affected the volume of long-haul traffic it secures in this area.

Although not an intervener in this proceeding, on March 23, 1954, the Secretary of the California Commission addressed a letter to us, a copy of which was transmitted to Pacific and introduced in evidence by the latter, stating the position of that Commission to be that the proposed transfer of the "local" operations is wholly unnecessary, would create a questionable expense, and would tend to

system, thus making it possible for patrons to travel between any points in the entire transit district. The study will probably not be completed before the end of 1955.

create uncertainty and confusion when the fixing of intrastate rates for Golden Gate might be considered; that the capital structure of Golden Gate would be of questionable soundness; that it would not recognize any transfer of the intrastate operating rights without its approval; and that the transfer would be contrary to the public interest unless conditioned to provide (a) that neither Golden Gate nor Pacific will ever claim or urge that Pacific's total intrastate operating results should not be considered for the purpose of prescribing intrastate rates for Golden Gate, (b) that Pacific shall agree to take back the operations from Golden Gate if and when ordered to do so either by this Commission or the California Commission, and then to restore the operations to the status and condition existing at the time of the transfer to Golden Gate, and (c) that Pacific and Golden Gate shall file written undertakings agreeing to the two stated conditions.

Pacific, reiterating that the local operations should be self sustaining, states that the first proposed condition is unacceptable. At the hearing, Pacific's vice president in charge of operations stated that Pacific also would not be willing to accept the second proposed condition, although in a letter to the California Commission, dated a week prior to the hearing, Pacific's president, with the concurrence of the vice president, stated that while imposition of the second condition would not be just, reasonable, or necessary, he felt that Pacific would accept it if we were to condition our order in these proceedings to require Pacific to agree that within some specified period it would take over Golden Gate's operations, upon order, after hearing, of this Commission.

The Union, the Counties, and the Commuter Associations collectively question the jurisdiction of this Commission over the proposed transaction under section 5 on the ground that Golden Gate is not a "carrier" as defined in the act, that it must first acquire the status of a "carrier" before jurisdiction attaches under section 5, and that the proposed transaction therefore, is not within the scope of section 5(2)(a)(i) which may be authorized. It is apparent that if the transaction were accom-

[fol. 26] plished without our prior authority it would be in violation of section 5(4). Jurisdiction is determined on the basis of facts existing at consummation, and Greyhound proposes to acquire control of Golden Gate concurrently with its becoming a carrier through the purchase. Jurisdiction has been asserted in numerous similar cases and is clear under section 5. *Columbia Motor Service Co.—Purchase—Columbia Terms. Co.*, 35 M.C.C. 531. Jurisdiction over a transaction which is subject to section 5 is exclusive and plenary under the plain language of paragraph 11 of section 5, and, upon our approval of such a transaction, the applicants would have full power to "carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority".

The Union further argues that the transaction is contrary to this Commission's long-standing policy favoring corporate simplification, and would adversely affect transportation service to the public in that (1) Golden Gate would not be financially capable of insuring continued service, (2) less service would be provided to the commuters who already find existing service inadequate and who would be deprived of their present option of riding on either intercity or local buses, (3) the extensive shifting, as a result of the transaction, of employees between the "local" and intercity operations would reduce labor efficiency and result in loss of time and expense to the employer and employee, and, in some instances, cause a loss of jobs, (4) the lowered morale resulting from the shifting of personnel, the negotiation of two labor contracts instead of one, and the creation of smaller collective bargaining units which would tend to diminish the re-[fol. 27] straining influences of varying interests within the unit, would increase the possibilities of strikes, probably resulting in service interruptions in both companies, and (5) the proposal would result in high costs to both companies.

The Counties and the Commuter Associations, like the Union, point to Golden Gate's limited capital, the possible impairment of labor relations, and question whether any savings would result which could not as easily be realized

by conducting the "local" operations as an independent division. They argue that the separation of management can be accomplished as well by the creation of a separate operating division as by the creation of a subsidiary corporation, pointing to the pending application wherein Pacific would be merged into its parent company and operated as a division of that carrier; that the real reason for the proposal is to disconnect the local operations for rate-making purposes, and thus defeat the California Commission's practice of determining proposed fare increases for the "local" operations in the light of Pacific's systemwide operations and revenues; and that the public would be prejudiced by the establishment of Golden Gate's future fares. They argue at some length in support of the rate-making policy of the California Commission, contending that the losses experienced by Pacific in the "local" operations because of the low fares are counterbalanced by the excessive rate of return in other parts of Pacific's system where the fares cannot be reduced because of the revenue needs of Pacific's competitors. These interveners urge that the matter of separating these operations, which are primarily in intrastate commerce, be left to the California Commission.

In their exceptions and at the oral argument, applicants argue that the examiner erred in not finding that sub-[fol. 28] stantial benefits in management, operations, and public relations would result from consummation of the proposed plan in matters where the cooperation or lack of cooperation of the California Commission and the Union would make no difference; and they add that under present rules of the California Commission and according to practices applied in the treatment of other commutation subsidiaries, simplified accounting and expeditious handling of rate cases, without regard to system earnings, will result from the separation. Pacific expects Golden Gate to be self-sustaining if present gross revenues from the "local" operations of nearly \$4,000,000 are increased by 20 to 25 percent through an upward adjustment of fares. Counsel for Pacific stated at the oral argument that he believed Pacific would accept a condition requiring it to furnish more working capital to Golden Gate than

the proposed \$150,000, and he renewed the offer to accept a condition to approval herein, requiring Pacific to agree that within a specified period it would take over the operations of Golden Gate if we should order it to do so. Applicants insist in their argument that section 5 of the act does not require a showing that the proposed plan will result only in affirmative public benefits or that all benefits possible of accomplishment will be accomplished, affording a solution to all existing problems, nor must improved service to the public be shown, but that probable benefits to the entire public, intercity patrons as well as commuters, must be balanced against probable injuries, and that a plan, proposed in the carrier's managerial discretion, should be approved unless found to be "contradictory", "Hostile" or injurious to the public interest. Even if the California Commission and the Union do not treat the two corporations as separate entities, applicants state, the situation would be as [fol. 29] it presently exists and the public interest would not be prejudiced; but the public interest will be promoted to the extent that any of the problems are alleviated. On the other hand, they submit, unless separation is authorized, existing problems will become aggravated when the dissimilar "local" operations become blanketed with the nationwide operations of Greyhound upon merger of Pacific with its parent.

Admitting that, through the proposed transaction, they hope to escape from the previously described rate-making practices and policies of the California Commission, applicants argue that we should be seriously concerned with the results of those practices and policies, and that we should approve the transaction to alleviate the burden placed on interstate commerce through the California Commission's policy of requiring a subsidization of intrastate operations by revenues derived from interstate operations, and thus further the national transportation policy by promoting efficient service and fostering sound economic conditions in transportation.

Pacific states that after the transfer it would be necessary for it to continue operations over some of the same routes as Golden Gate in order to obtain access to its

terminals in San Francisco and Oakland, but, if there is serious objection to this duplication, applicants would accept a condition, albeit reluctantly, whereby Golden Gate's duplicating interstate rights would be canceled upon consummation of the transaction. If this were done, the remaining interstate operating rights of Golden Gate would be negligible both from the standpoint of points and traffic.

[fol. 30] The Counties and the Commuter Associations argue that the service in question, which is almost completely intrastate in character, should be left to local regulation, that this Commission should not set itself up as an appellate body to review the validity of rate orders of the California Commission, that it was never contemplated that this Commission should act in such a capacity, and that the proceedings before the California Commission are not a part of this record. They stress that Pacific is seeking relief here because it knows, from past experience, that the California Commission would not approve of Golden Gate's proposed financial structure, referring to the rejection by the California Commission of a proposed transfer in 1952 to an experienced operator of the Marin County operations on the ground that the proposed financial structure, involving the contribution of \$200,000 by the operator, was inadequate. They urge that, although Pacific now asserts that the "local" operations constitute one geographic and economic unit distinct and separate from the intercity operations, it significantly decided against transferring all the "local" operations in 1952 and instead sought to transfer only the Marin County operations. These protestants submit that if the State Commission's rate-making policies are illegal, Pacific has an adequate remedy in the courts, of which it has not availed itself in connection with prior rate decisions of the California Commission. With respect to applicants' allegation that rate proceedings before that Commission have in the past been protracted, they point to adjournment requests by Pacific in the proceedings determined in 1954, and cite one instance in which a new application in 1950 was consolidated with pending proceedings, prior to de-

termination of which an interim or emergency fare increase was granted.

[fol. 31] The Union argues in its exceptions that the proposed report should have found that employees would be adversely affected by the transaction. It adds that, after careful study, the California Commission has concluded that the Marin County operations cannot be placed on a profitable basis merely by a fare increase, that it is evident that that Commission would not authorize substantially increased fares in the "local" operations, after separation, and even if such increases were permitted, any expected increase in revenues would be tempered by the loss of traffic resulting from any sharp increase in fares.

The phrase "consistent with the public interest" is broad in scope, as repeatedly stated by the courts, and we are plainly charged with the obligations, while keeping in mind the national transportation policy, of considering all matters of every character affecting the public interest which may result from a proposed transaction, including the weighing of prospective benefits to the public against any disadvantages which might be expected to result. However, our province is not to determine whether some plan other than the one proposed might be more advisable. Our function is to determine whether the plan presented will be consistent with the public interest, although we may require modification of the plan or impose conditions where necessary in the public interest.

While our policy has been to encourage corporate simplification, this policy should not be invoked so as to cause the impractical retention in a single entity of highly dis-[fol. 32] similar operations, as here, especially if such retention causes the undesirable results shown by this record. As previously stated, the "local" and intercity services are different with respect to the nature of the service provided, the type of passengers carried, the mileage involved, and the type of equipment utilized. Pacific's public relations have suffered because of its difficulties with respect to its "local" operations, and its management has had to devote more time and energy to those operations than are commensurate with the comparative

traffic and revenue producing results of this service. It is also apparent that in the past the commutation services have been conducted at considerable losses, which have had to be borne from profits obtained from Pacific's system operations to the prejudice of its long-haul operations, and that even under the recent fare increase the "local" operations are not expected to produce revenues equalling the cost of providing the service. That increase, as explained by the California Commission, is expected to reduce anticipated losses on the Marin County operations, during the year ending June 30, 1955, by only about 22 percent.

As contended by applicants, we may not properly overlook the burden on the interstate operations of Pacific which the proposed transaction would alleviate. A new corporation, with a completely separate management experienced in "local" mass transportation, will be able to confine its attention to that service and thus conduct those operations more efficiently than the present management, whose main interests are concerned with the long-haul operations. At the same time, Pacific's management will [fol. 33] be relieved of the necessity of conducting two dissimilar services, enabling it to concentrate exclusively on its inter-city operations. This is especially important in view of the decline in Pacific's long-haul traffic, both interstate and intrastate. The same service now rendered would be provided by Golden Gate, and the same facilities would be available. While, as pointed out by the Union, commuters would not be permitted the option of riding on Pacific's through buses in the Marin County and Peninsula areas, very little commuter traffic has been handled on these through trips. However, as previously shown, interstate passengers would, as now, have the option of riding on either intercity or "local" buses where the routes coincide, and a joint fare arrangement would facilitate transfers of passengers at connecting points. As Golden Gate's management would be more familiar with local conditions and more disposed to study the particular needs of its patrons, the probabilities of adjustments to provide better service and eliminate causes of any existing complaints

would be increased. Ultimate integration into the contemplated rapid transit system should be facilitated.

Under the circumstances here, the soundness of Golden Gate's financial structure under the proposed financing is questionable. It is not our function in this proceeding to determine the justness and reasonableness of the intrastate fares in question or the lawfulness of the policies of the California Commission. Neither shall we attempt to prophesy the future action of that body in its rate proceedings. The amount of interstate traffic to be transported by Golden Gate would produce an estimated 5.7 percent of its total revenues, and less than 20 percent of [fol. 34] this amount would be the result of a service by Golden Gate which could not also be provided by Pacific. Thus Golden Gate would essentially be a "local" operation and, as we shall find that the separation would be consistent with the public interest, the question as to the fares to be charged is one to be determined by the local authorities. However, as it appears that, if Golden Gate had conducted the "local" operations during the year 1953, it would have had a deficit of approximately \$150,000, assuming that the estimated additional revenue of \$84,000 from the fare increase would decrease the expected deficit of \$234,300 by that amount, and as it would be obliged to incur equipment and other obligations, we are of the opinion that the contemplated cash investment in Golden Gate by Pacific of \$150,000 is insufficient, and that \$250,000 would be more appropriate to its needs. Our findings will be conditioned accordingly.

The Union's concern as to the adverse effects of the separation on employees seems unwarranted. Applicants have stated that there will be no loss of employment, and that existing terms and conditions of employment, seniority rights, pension, welfare, insurance, and hospital plans, and other benefits accorded to Pacific's employees would be extended to Golden Gate's employees. However, the Union has persisted in its opposition. Our approval of the transaction is with the expectation that applicants and the Union will make every effort to reach an agreement to protect all employees of Pacific and Golden Gate affected by the transaction, so that they will not be placed

in any worse position than may be required by the exigencies of the situation. To insure such protection, our findings will be conditioned to reserve jurisdiction for a period of 2 years from date of consummation to make such additional findings and to impose such terms and conditions with respect to all employees of Pacific and Golden Gate as may be necessary to protect their interests. [fol. 35] As previously mentioned, at the hearing Pacific's vice president in charge of operations rejected the suggestion made by the California Commission in its letter of March 13, 1954, that we should impose a condition requiring Pacific to take back Golden Gate's operations if and when ordered to do so by either this Commission or the California Commission. However, at the oral argument, counsel referred to a letter dated April 7, 1954, prior to the hearing, wherein Pacific's president stated that it would agree that, within a specified period, it would take back Golden Gate's operations upon our order, after hearing. We doubt the wisdom of approving such a transaction as this on an experimental basis. Also the problems which would be attendant upon the possible entry of such a mandatory order, such as the necessity for periodic inspection of Golden Gate's books and appraisal of its operations and financial condition to decide whether the proceeding should be reopened for hearing to determine whether such an order should be entered directing a reunification of the operations, make such a condition of doubtful practicability. We are of the opinion that the question of possible future reunification of these operations is one which properly should be left to applicants' management.

The proposed plan contemplates the holding of duplicating operating rights by both carriers. As previously mentioned, as long as it may continue to serve San Francisco in its long-haul operations, Pacific would accept any restriction that might be imposed to limit its service over the coinciding routes, and applicants specifically suggest a condition requiring cancellation of all duplicating interstate operating rights of Golden Gate. It might be noted, however, that any restriction on Pacific's authority [fol. 36] to serve intermediate points, but with Golden

Gate authorized to serve those points; might react to the detriment of long-haul passengers who would be compelled to use Golden Gate and change buses. Also, while any lack of authority in Golden Gate to operate in interstate commerce over the duplicating routes would not be of too great significance, so far as the traveling public is concerned, retention of such authority would enable some intercity passengers to use the equipment of either Pacific or Golden Gate, and, in addition, would provide Golden Gate with some additional revenue. We are therefore of the opinion that the holding of authority to provide duplicating service may, in this instance, be found to be consistent with the public interest.

We find, in No. MC-F-5643, that acquisition by Pacific Greyhound Lines of control of Golden Gate Transit Lines through ownership of capital stock, the contemporaneous purchase by Golden Gate Transit Lines of the presently-described operating rights and property of Pacific Greyhound Lines, and the acquisition by The Greyhound Corporation of control of Golden Gate Transit Lines, and of the operating rights and property through the transaction, upon the terms and conditions set forth herein, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a), and will be consistent within the public interest, and that, if the transaction is consummated, Golden Gate Transit Lines will be entitled to a certificate covering the said portions of the operating rights granted in No. MC-1511 and subnumbered proceedings as specifically set forth in appendix A hereto; *provided, however*, that if the authority herein granted is exercised, the amount of the cash payment to be made by Pacific Greyhound Lines to Golden [fol. 37] Gate Transit Lines shall be \$250,000; *provided further* that, if the authority herein granted is exercised, the authority of Pacific Greyhound Lines to operate, over an alternate route, between Danville and Dublin, Calif., over California Highway 21 shall be cancelled; *provided, further*, that, if the authority herein granted is exercised, Golden Gate Transit Lines, shall amortize in equal monthly amounts over a maximum period of three years, commencing with the date of consummation of the purchase,

the amount assigned to its "Other Intangible Property" account as a result of the transaction, or, in lieu of amortization in any month of the three year period, it may write off the unamortized balance of the amount so assigned, and Pacific Greyhound Lines shall immediately write off the excess, if any, of the consideration paid over the net book value of the stock of Golden Gate Transit Lines, which it would acquire, excluding intangibles, as of the date of consummation, such amortization and write-off to be accomplished in the manner to be determined upon submission of a statement showing all expenditures and the accounting proposed to record the transaction as required by our order herein; and *provided, further*, that, if the authority herein granted is exercised, jurisdiction shall be reserved for a period of 2 years from the date the transaction is consummated in order to make such additional findings and to impose such terms and conditions with respect to employees of Pacific Greyhound Lines and of Golden Gate Transit Lines, as may be necessary and lawful, if, upon petition by any of the said employees or their representatives, within that period, it is shown that the conditions of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done pursuant to, or as [fol. 38] direct result of, the consummation of the transaction under the authority herein granted; and that consummation of the transaction by applicants will be considered acceptance of the said reservation of jurisdiction.

We further find, in No. MC-1511 (Sub-No. 103), that, in connection with the transaction herein authorized, the public convenience and necessity require the continuance by Pacific Greyhound Lines of its operations in interstate or foreign commerce as a common carrier by motor vehicle, of passengers and their baggage, and express, mail, and newspapers, in the same vehicle with passengers, between the termini, over the routes, and to and from the intermediate points specified in appendix B hereto; that Pacific Greyhound Lines is fit, willing and able properly to perform such service; and that, upon consummation of the transaction herein authorized, and upon compliance

with sections 215 and 217 of the act and the rules, regulations, and requirements thereunder, it will be entitled to a certificate of public convenience and necessity authorizing such operations.

An appropriate order will be entered.

COMMISSIONER HUTCHINSON, being necessarily absent, did not participate in the disposition of these proceedings.

[fol. 39]

APPENDIX A TO EXHIBIT "A"

Interstate operating rights of Pacific Greyhound Lines to be acquired by Golden Gate Transit Lines under the findings in the report. All authority is over regular routes in California, in both directions, serving all intermediate points, unless otherwise noted.

Passengers, and their baggage, and express, mail, and newspapers, in the same vehicle with passengers,

MARIN COUNTY ROUTES

Between Novato and San Francisco:

From Novato, over U. S. Highway 101 to San Francisco.

Between San Rafael and Corte Madera Road Junction:

From San Rafael, over unnumbered highway via San Anselmo and Corte Madera to junction U. S. Highway 101 (Corte Madera Road Junction).

Between Inverness and San Anselmo:

From Inverness, over unmarked county highway to junction California Highway 1 (Point Reyes Station), thence over unnumbered highway to Fairfax, thence over Sir Francis Drake Boulevard to San Anselmo.

Between Kentfield Corners and Greenbrae:

From junction unnumbered highways north of Kentfield (Kentfield Corners), over Sir Francis Drake Boulevard to junction U. S. Highway 1 (Greenbrae).

Between Mill Valley and Manzanita:

From Manzanita over unnumbered highway to Alto, thence over Blithedale Avenue and Throckmorton Street to Mill Valley.

Between Mill Valley and Tamalpais High School:

From Tamalpais High School over Miller Avenue to Mill Valley.

Between Alto and Belvedere:

From Alto over Alto Highway to Tiburon Wye, thence over unnumbered highway to Belvedere.

Between Belvedere Junction and Tiburon:

From junction unnumbered highways northwest of Belvedere (Belvedere Junction), over unnumbered highway to Tiburon.

[fol. 40] Between Tamalpais Valley Junction and Bolinas:

From Tamalpais Valley Junction over California Highway 1 to Dias Ranch, Calif., thence over unnumbered highway (known as Panoramic Highway), to junction unnumbered highway (known as Frank Valley Road), approximately 0.8 miles north of Dias Ranch, thence over unnumbered highway (Frank Valley Road) to Muir Beach Junction, thence over California Highway 1 to junction unnumbered highway, about 2 miles northwest of Stinson Beach, thence over unnumbered highway to Bolinas.

Between Stinson Beach and Muir Woods Junction:

From Muir Woods Junction over unnumbered highway through Bootjack, to Stinson Beach.

Between Waldo Junction and Fort Baker Junction:

From junction unnumbered highway and U. S. Highway 101 northwest of Sausalito, over unnumbered highway via Sausalito to junction U. S. Highway 101 (Fort Baker Junction).

CONTRA COSTA COUNTY ROUTES

Between San Francisco and Antioch:

From San Francisco over the San Francisco-Oakland Bay Bridge to Oakland, thence over California Highway 75 to Conerod, thence over California Highway 24 to Willow Pass Junction, thence over California Highway 4 to Antioch.

Between Berkeley and Temescal Junction:

From Berkeley over California Highway 24 to Temescal Junction.

Between Martinez and Accalanes Junction:

From Martinez over Pleasant Hill Road to junction California Highway 24 (Accalanes Junction).

Between Walnut Creek and Danville:

From Walnut Creek over California Highway 21 to Danville.

Between Concord and Port Chicago:

From Concord, over unnumbered highway via Clyde, to Port Chicago.

Between Port Chicago and Willow Pass Junction:

From Port Chicago, over unnumbered highway to Willow Pass Junction.

[fol. 41] Between Pittsburg and Concord:

From Pittsburg, over unnumbered highway, (commonly known as Donovan Road) to junction unnumbered highway (commonly known as Marsh Creek Road), thence over Marsh Creek Road to Concord.

PENINSULA ROUTES

Between San Francisco and San Mateo:

From San Francisco, over U. S. Highway 101 to San Mateo.

Between San Francisco and Bellhaven:

From San Francisco over By-Pass U. S. Highway 101 to junction unnumbered highway north of South San Francisco (Freeway Junction), thence over said unnumbered highway via South San Francisco and San Francisco International Airport to junction By-Pass U. S. Highway 101 (Airport Overpass), thence over said By-Pass U. S. Highway 101 to junction Willow Road (Bellhaven).

Between Freeway Junction and Airport Overpass, via Freeway:

From junction By-Pass U. S. Highway 101 and unnumbered highway north of South San Francisco (Freeway Junction), over said By-Pass U. S. Highway 101 to junction unnumbered highway southwest of San Francisco International Airport (Airport Overpass), serving no intermediate points, for operating convenience only.

Between San Bruno Junction and San Bruno:

From junction By-Pass U. S. Highway 101 and unnumbered highway east of San Bruno (San Bruno Junction), over unnumbered highway to junction U. S. Highway 101 (San Bruno).

Between San Francisco and Half Moon Bay, over California Highway 1.

Between San Mateo and Palo Alto, over U. S. Highway 101.

Between East San Mateo and San Mateo Junction:

From junction of Third Avenue and By-Pass U. S. Highway 101 (East San Mateo), over Third Avenue to Delaware Street, thence over Delaware Street to Fourth Avenue, thence over Fourth Avenue to junction U. S. Highway 101 (San Mateo Junction).

[fol. 42] Between Bellhaven and Palo Alto:

From junction By-Pass U. S. Highway 101 and unnumbered highway north of Palo Alto (Bellhaven),

over said unnumbered highway to junction U. S. Highway 101 (Palo Alto), for operating convenience only, serving no intermediate points.

[fol. 43] APPENDIX B TO EXHIBIT "A"

Operating authority to be granted in No. MC-1511 (Sub-No. 103) to Pacific Greyhound Lines to transport, over regular routes:

Passengers and their baggage, and express, mail, and newspapers, in the same vehicle with passengers.

MARIN COUNTY ROUTES

Between Novato, Calif., and San Francisco, Calif., over U. S. Highway 101:

Serving all intermediate points.

CONTRA COSTA COUNTY ROUTES

Between Port Chicago, Calif., and Antioch, Calif.:

From Port Chicago, over unnumbered highway via Willow Pass Junction and Pittsburg to Antioch, and return over same route.

Between Martinez Junction, Calif., and Camp Stoneman, Calif.:

From Martinez Junction, over California Highway 4 via Concord Junction and Camp Stoneman Junction to Camp Stoneman, and return over same route, to be operated as an alternate route.

Between Antioch, Calif., and Pittsburg, Calif.:

From Antioch, over California Highway 4 to Camp Stoneman, thence over unnumbered highway to Pittsburg, and return over same route.

Between San Francisco, Calif., and Oakland, Calif.:

From San Francisco, Calif., over the San Francisco-Bay Bridge to Oakland, Calif., and return over the same route.

Serving all intermediate points.

PENINSULA ROUTES

Between San Francisco, Calif., and Bellhaven, Calif.:

From San Francisco over By-Pass U. S. Highway 101 to junction unnumbered highway north of South San Francisco (Freeway Junction), thence over said unnumbered highway via South San Francisco and San Francisco International Airport to junction By-Pass U. S. Highway 101 (Airport Overpass), thence over said By-Pass U. S. Highway 101 to junction Willow Road (Bellhaven), and return over the same route.

[fol. 44]. Between San Francisco, Calif., and Half Moon Bay, Calif., over California Highway 1.

Between Crystal Springs Dam, Calif., and Half Moon Bay, Calif., over Highway 5.

Immediately above-described routes (2), restricted to service during the period extending from approximately June 10 to September 10 of each year.

Between San Mateo, Calif., and Palo Alto, Calif., over U. S. Highway 101.

Between East San Mateo, Calif., and San Mateo Junction Calif.:

From junction of Third Avenue and By-Pass U. S. Highway 101 (East San Mateo), over Third Avenue to Delaware Street, thence over Delaware Street to Fourth Avenue, thence over Fourth Avenue to junction U. S. Highway 101 (San Mateo Junction).

Between Bellhaven, Calif., and Palo Alto, Calif.:

From junction By-Pass U. S. Highway 101 and unnumbered highway north of Palo Alto (Bellhaven) over said unnumbered highway to junction U. S. Highway 101 (Palo Alto).

Serving all intermediate points on all of the above-described routes.

**Between Freeway Junction and Airport Overpass,
via Freeway:**

From junction By-Pass U. S. Highway 101 and unnumbered highway north of South San Francisco (Freeway Junction), over said By-Pass U. S. Highway 101 to junction unnumbered highway southwest of San Francisco International Airport (Airport Overpass), and return over the same route, serving no intermediate points, for operating convenience only.

The above so-called MARIN COUNTY ROUTES, as well as the PENINSULA ROUTES, are proposed to be used in conjunction with applicants' authorized operations between Portland, Oreg., and Lordsburg, N. Mex., as described on sheets 2 and 3 of certificate No. MC-1511 dated November 22, 1950. The CONTRA COSTA COUNTY ROUTES are proposed to be used in conjunction with authorized operations from Borden Junction over Byron Avenue to Byron, thence over Kellogg Road to Marsh Corners, thence over Marsh Creek Road to Concord, thence over California Highway 24 (formerly California Highway 75) to Oakland, and return, as described on sheet 14 of certificate No. MC-1511, dated November 22, 1950. In addition, the Marin County and Peninsula Routes will connect at San Francisco and the Contra Costa Routes will connect at Oakland, with the following authorized operations as described on the sheets indicated in certificate No. MC-1511, dated November 22, 1950. Sheet 4—Between Salt Lake City, Utah, and San Francisco, Calif., over U. S. Highway 40. Sheet 5—Between San Francisco, Calif., and Stockton, Calif., over U. S. Highway 40, Alternate U. S. Highway 40, unnumbered highway, and California Highway 4. Sheet 8—Between San Francisco, Calif., and Stockton, Calif., over U. S. Highway 50. Sheet 8—Between San Francisco, Calif., and North Hayward, Calif., over U. S. Highway 50 and unnumbered highway.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 6th day of July, A. D. 1955.

No. MC-F-5643

THE GREYHOUND CORPORATION—CONTROL; PACIFIC
GREYHOUND LINES—CONTROL; GOLDEN GATE TRANSIT
LINES—PURCHASE (PORTION)—PACIFIC GREYHOUND LINES

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That acquisition by Pacific Greyhound Lines, of San Francisco, Calif., of control of Golden Gate Transit Lines, also of San Francisco, through ownership of capital stock, and for the contemporaneous purchase by Golden Gate Transit Lines of certain operating rights and property of Pacific Greyhound Lines, and acquisition by The Greyhound Corporation, of Chicago, Ill., of control of Golden Gate Transit Lines, and of the operating rights and property through the transaction, be, and they are hereby approved and authorized, subject to the terms and conditions set out in the findings in said report.

It is further ordered, That, if the parties to the transaction herein authorized desire to consummate same, they shall (1) promptly take such steps as will insure compliance with sections 215 and 217 of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (2) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That, if the authority herein granted is exercised, Pacific Greyhound Lines and Golden Gate Transit Lines shall submit for consideration and approval,

a sworn statement and one copy thereof showing all expenditures made, by dates, or to be made, in connection with the transactions authorized, including the consideration, legal and other fees, commissions, and any other cost incidental to the transaction; the assets acquired, and the liabilities assumed, indicating the account number and title to which each item has been, or is to be debited or credited.

It is further ordered, That the authority herein granted shall not be exercised prior to the effective date hereof, and that this order shall be effective on August 24, 1955.

It is further ordered, That unless the authority herein granted is exercised within 180 days from the effective date hereof, this order shall be of no further force and effect.

[fol. 47] *And it is further ordered*, That recital in said report of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 48]

EXHIBIT "C" TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 19th day of September, A. D. 1955.

No. MC-F-5643

THE GREYHOUND CORPORATION—CONTROL; PACIFIC GREYHOUND LINES—CONTROL; GOLDEN GATE TRANSIT LINES—PURCHASE (PORTION)—PACIFIC GREYHOUND LINES

No. MC-1511 (Sub-No. 103)

PACIFIC GREYHOUND LINES, EXTENSION—
SAN FRANCISCO, CALIF.

Upon consideration of the record in the above-entitled proceedings, and of:

1. Petitions of (a) Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Divisions 1055, 1222, 1223, 1225 and 1471, and (b) the Counties of Marin and Contra Costa, California, Marin County Federation of Commuter Clubs, and Contra Costa County Commuters Association, protestants, for rehearing and reconsideration of the report and order of July 6, 1955; and

2. Applicants' reply to the petitions; and

It appearing, That the petitions do not present any facts or arguments which warrant reopening the proceedings for rehearing or reconsideration:

It is ordered, That the said petitions be, and they are hereby, denied.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[for 49]

EXHIBIT "D" TO COMPLAINT

ORDER

INTERSTATE COMMERCE COMMISSION

No. MC-F-5643

THE GREYHOUND CORPORATION—CONTROL; PACIFIC
GREYHOUND LINES—CONTROL; GOLDEN GATE TRANSIT
LINES—PURCHASE (PORTION)—PACIFIC GREYHOUND LINES

In the matter of a further postponement of the effective
date of the order of July 6, 1955.

PRESENT:

Hugh W. Cross, Chairman, to whom the above-
entitled matter has been assigned for action
thereon.

Upon consideration of the record in the above-entitled
proceeding, and of a request on behalf of the protesting
counties and commuter associations for a further postpone-
ment of the effective date of the order of July 6, 1955, to
allow time to seek judicial review in the event the petitions
for rehearing and reconsideration are denied, and it ap-
pearing that the said petitions were denied on September
19, 1955; and good cause therefor appearing:

It is ordered, That the effective date of the said order of
July 6, 1955, be, and it is hereby, further postponed to Octo-
ber 19, 1955.

Dated at Washington, D. C., this 27th day of September,
A. D. 1955.

By the Commission, Chairman Cross.

Harold D. McCoy, Secretary.

(Seal)

[fol. 50]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION—Filed
December 15, 1935

Come now the United States of America and the Interstate Commerce Commission, defendants, and in answer to the Complaint:

I.

Admit the allegations contained in Paragraph I, except that they neither admit nor deny for lack of knowledge the allegations that the members of the Contra Costa County Commuters Association and the commuter organizations composing the Marin County Federation of Commuter Clubs regularly use the bus service of Pacific Greyhound Lines.

II.

Admit the allegations contained in Paragraph II, except those concerning the status of Pacific Greyhound Lines under Section 226 of the Public Utilities Code of the State of California, which are legal conclusions not requiring an answer, and the allegations in the last two sentences, which the defendants neither admit nor deny for lack of knowledge. The defendants do admit that the principal operations of Golden Gate Transit Lines will be local bus service within the metropolitan area surrounding San Francisco Bay.

[fol. 51]

III.

Answering the allegations contained in Paragraph III, the defendants admit that Golden Gate Transit Lines is a corporation organized under the laws of the State of

California on May 7, 1953, that it engages in no business activities, and that it has not conducted motor carrier operations.

IV.

Admit the allegations contained in Paragraphs IV through VII.

V.

Admit the allegations contained in Paragraph VIII, but respectfully refer the Court to the plaintiffs' petition for rehearing and reconsideration for a complete statement of the grounds relied upon therein by the plaintiffs.

VI.

Admit the allegations contained in the first two sentences of Paragraph IX. The remaining allegations do not require an answer.

VII.

Deny the allegations contained in Paragraph X.

VIII.

For further answer to the allegations contained in the Complaint, the defendants deny that the action of the Interstate Commerce Commission challenged herein is unlawful for the reasons specified in the Complaint or for any other reason whatsoever. The defendants aver that the action of the Commission is fully supported and justified by the record and that in taking such action the Commission carefully considered the National Transportation Policy and considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to the proceedings by their respective counsel; and that said action was not arbitrary, unjust or contrary to law.

[fol. 52]

IX.

Except as herein expressly admitted, the defendants deny each and every allegation contained in the Complaint.

WHEREFORE, the defendants pray that the relief prayed for in the Complaint be denied, and that the Complaint be dismissed, plaintiffs to pay the costs.

Stanley N. Barnes, Assistant Attorney General:

s/ Lloyd H. Burke, United States Attorney, by
s/ Wm. B. Spohn, Asst. U. S. Attorney; s/ James
E. Kilday; s/ John H. D. Wigger, Attorneys, De-
partment of Justice, Washington 25, D. C., At-
torneys for the United States.

s/ Robert W. Ginnane, General Counsel, Interstate
Commerce Commission, Washington 25, D. C.,
Attorney for the Interstate Commerce Commis-
sion.

Certificate of Service (omitted in printing).

[fol. 53] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

Civil Action No. 34985

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY
FEDERATION OF COMMUTER CLUBS, CONTRA COSTA COUNTY
COMMUTERS ASSOCIATION, and AMALGAMATED ASSOCIATION
OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EM-
PLOYEES OF AMERICA, Divisions 1055, 1222, 1223, 1225,
and 1471, Plaintiffs,

v.

United States of America and Interstate Commerce
Commission, Defendants,

Golden Gate Transit Lines, Pacific Greyhound Lines, and
The Greyhound Corporation, Applicants for interven-
tion.

MOTION OF GOLDEN GATE TRANSIT LINES, ET AL. TO
INTERVENE AS DEFENDANTS—Filed December 29, 1955

[fol. 54] Applicants, Golden Gate Transit Lines, a corporation, Pacific Greyhound Lines, a corporation, and The Greyhound Corporation, a corporation (hereinafter sometimes referred to as "Golden Gate", "Pacific", and "Greyhound", respectively), move the Court for leave to intervene as defendants in this action, in order to assert the defenses set forth in their proposed motion to dismiss, of which a copy is hereto attached and by this reference made a part hereof, upon the ground that applicants were parties in interest, and each of them was a party in interest, having been applicants in the proceedings before the Interstate Commerce Commission referred to in the complaint herein, said proceedings being entitled: "The Greyhound Corporation—Control; Pacific Greyhound Lines—Control; Golden Gate Transit Lines—Purchase (portion)—Pacific Greyhound Lines, Docket No. MC-F-5643", and "Application of Pacific Greyhound Lines for a certificate of public convenience and necessity over certain routes in California, Docket No. MC-1511 (Sub-No. 103)." In said proceedings the Interstate Commerce Commission made its order dated July 6, 1955, a copy of which is attached to the complaint herein as Exhibit B, and which order the plaintiffs pray by their complaint herein to have this Court permanently suspend, enjoin, annul, (sic) and set aside. As appears from the report of the Interstate Commerce Commission in said proceedings, a copy of which is attached to the complaint herein as Exhibit A, the interests of applicants, and of each of them, are involved in this action. By reason of the premises applicants have an unconditional right to intervene herein under the provisions of Title 28 U.S.C.A. Section 2323, and make this motion for leave to intervene as of right.

Dated December 29th, 1955

Allan P. Matthew, Gerald H. Trautman, 1500 Balfour Building, San Francisco 4, California;
Douglas Brookman, 1815 Mills Tower, San

San Francisco 4, California; Attorneys for Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation, Applicants for Intervention.

McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California, Of Counsel.

[File endorsement omitted]

[fol. 55] Proposed Motion of Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, Intervening Defendants, to Dismiss Complaint for Failure to State a Claim Upon Which Relief Can Be Granted.

(Omitted. Printed side page 78, infra.)

[fol. 57] Notice of Motion of Intervening Defendants' Motion to Dismiss Complaint.

(Omitted. Printed side page 97, infra.)

[fol. 59] Memorandum of Points and Authorities in Support of Motion of Intervening Defendants to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can Be Granted.

(Omitted. Printed side page 84, infra.)

[fol. 69] Draft of Judgment of Dismissal Proposed by Intervening Defendants, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, Filed Pursuant to Rule 12(b) of the Rules of the United States District Court for the Northern District of California.

(Omitted. Printed side page 81, infra.)

[fol. 71] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

NOTICE OF MOTION OF GOLDEN GATE TRANSIT LINES ET AL.
TO INTERVENE—Filed December 29, 1955

[fol. 72] To:

Spurgeon Avakian, W. O. Weissich, Francis W. Collins, Financial Center Building, Oakland 12, California; Jack Robertson, Keating Building, Menlo Park, California, Attorneys for Plaintiffs.

Robert Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D.C., Attorney for Defendant, Interstate Commerce Commission; Stanley N. Barnes, James E. Kilday, John H. D. Wigger, Department of Justice, Washington 25, D.C.;

Lloyd H. Burke, United States Attorney, Post Office Building, Seventh and Mission Streets, San Francisco, California, Attorneys for Defendant, The United States of America.

You will please take notice that on Monday, January 9, 1956 at 9:30 o'clock A.M. or as soon thereafter as counsel may be heard in the courtroom of the Honorable Master Calendar Judge, in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, applicants for intervention will bring on for hearing before the above entitled Court the aforesaid motion to intervene as defendants.

Dated at San Francisco, California, December 29, 1955.

Allan P. Matthew, Gerald H. Trautman, 1500 Bal-four Building, San Francisco 4, California.

Douglas Brookman, 1815 Mills Tower, San Francisco 4, California, Attorneys for Golden Gate Transit Lines, Pacific Greyhound Lines, and The

Greyhound Corporation, Applicants for Intervention.

McCutchen, Thomas, Matthew, Griffiths & Greene,
1500 Balfour Building, San Francisco 4, California, Of Counsel.

[File endorsement omitted]

[fol. 73] CERTIFICATE OF SERVICE BY MAIL OF MOTIONS TO INTERVENE AND TO DISMISS COMPLAINT (omitted in printing)

[fol. 75] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

ORDER GRANTING MOTION TO INTERVENE AS DEFENDANTS—
January 9, 1956

[fol. 77] IN UNITED STATES DISTRICT COURT

ORDER DESIGNATING UNITED STATES CIRCUIT JUDGE AND
UNITED STATES DISTRICT JUDGES PURSUANT TO SECTION 2284
OF THE UNITED STATES CODE—January 12, 1956

Whereas, in my judgment the public interest so requires,
I, pursuant to the provisions of Section 2284 of Title 28,
United States Code, do hereby designate and appoint the

Honorable William Healy,

United States Circuit Judge for the Ninth Judicial Circuit,
and the

Honorable George B. Harris,

United States District judge for the Northern District of
California, and the

Honorable Oliver J. Carter,

United States District Judge for the Northern District
of California, and to hold the District Court for the North-

ern District of California at San Francisco, California, at such time as may be agreed upon by the judges, and to hear and determine the following case: County of Marin, et al., v. United States of America, et al., and Golden Gate Transit Lines, et al., intervenors. Civil No. 34985, and all motions and proceedings therein.

Dated at San Francisco, California, this 12th day of January, 1956.

William Denman, Chief Judge, United States Court of Appeals, Ninth Circuit.

[File endorsement omitted]

[fol. 76] The motion of applicants for intervention, Golden Gate Transit Lines, Pacific Greyhound Lines and the Greyhound Corporation, to intervene herein as defendants, pursuant to Title 28 U.S.C.A. §2323 having come on for hearing before the Honorable Oliver J. Carter on January 9, 1956, upon the said motion and the complaint herein, and the moving parties having appeared by Allan P. Matthew, Esq., their attorney, and no party having appeared in opposition to said motion, and the said motion having been heard and considered by the Court, and submitted to the Court for decision, and it appearing to the Court that said motion to intervene as defendants should be granted;

Now, Therefore, It Is Hereby Ordered that the motion of Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation to intervene as defendants by and it is hereby granted and said intervening defendants by and they are hereby granted leave to file a motion to dismiss the complaint in, or substantially in, the form of the proposed motion to dismiss complaint attached to said motion to intervene as defendants.

Done In Open Court this 9th day of January, 1956.

Oliver J. Carter, Judge.

Approved as to form, as provided in Rule 21, Rules of the United States District Court for the Northern District of California.

County of Marin, et al., Plaintiffs, By Spurgeon Avakian, Their Attorney.

United States of America and Interstate Commerce Commission, Defendants, By Lloyd H. Burke, United States Attorney; William B. Spohn, Assist. U.S. Atty.

[File endorsement omitted]

[fol. 78] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

MOTION OF GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES AND THE GREYHOUND CORPORATION, INTERVENING DEFENDANTS, TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED
—Filed January 23, 1956

Intervening defendants, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, [fol. 79] pursuant to leave of Court first had and obtained, move the Court to dismiss the complaint herein, pursuant to Rule 12(b), Federal Rules of Civil Procedure.

This motion is based upon the complaint herein and the report and order of the Interstate Commerce Commission dated July 6, 1955, copies of which are attached to the complaint as Exhibits A and B. Said report and order were made in the proceedings before the Interstate Commerce Commission referred to in the complaint herein, said proceedings being entitled: "The Greyhound Corporation—Control; Pacific Greyhound Lines—Control; Golden Gate Transit Lines—Purchase (Portion)—Pacific Grey-

hound Lines, Docket No. MC-F-5643", and "Application of Pacific Greyhound Lines for a certificate of public convenience and necessity over certain routes in California, Docket No. MC-1511 (Sub-No. 103)."

This motion is made upon the ground that the complaint fails to state a claim upon which relief can be granted to plaintiffs or any of them in that the Interstate Commerce Commission, by its said report and order dated July 6, 1955 entered in said proceedings, Docket No. MC-F-5643 and Docket No. MC-1511 (Sub-No. 103), as aforesaid, approving and authorizing the transaction for which authority was sought therein, properly found that the transaction is within the scope of Section 5(2)(a) of the Interstate Commerce Act (Title 49 U.S.C.A. Section 5(2)(a)), and, in particular, that the proposed transfer of certain properties and operating rights from Pacific to Golden Gate, and the acquisition of control of Golden Gate by Pacific through ownership of the former's capital stock, and the acquisition of concurrent control of Golden Gate by Greyhound through Pacific, could be accomplished by authority of an order of the Interstate Commerce Commission and not otherwise. [fol. 80] Wherefore, these intervening defendants pray that the complaint herein be dismissed with prejudice and that these intervening defendants have and recover their costs of suit incurred, and to be incurred, herein.

Dated January 20, 1956.

Allan P. Matthew; Gerald H. Trautman, 1500 Balfour Building, San Francisco 4, California; Douglas Brookman, 1815 Mills Tower, San Francisco 4, California, Attorneys for Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation, Defendants in Intervention.

McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California, Of Counsel.

[fol. 81] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

DRAFT OF JUDGMENT OF DISMISSAL PROPOSED BY INTERVENING
DEFENDANTS, GOLDEN GATE TRANSIT LINES, PACIFIC GREY-
HOUND LINES AND THE GREYHOUND CORPORATION, FILED
PURSUANT TO RULE 12(b) OF THE RULES OF THE UNITED
STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA

[fol. 82] Judgment of Dismissal

The motion of intervening defendants Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation to dismiss the complaint herein pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure having come on for hearing before the Court of three judges specially constituted pursuant to Title 28 U.S.C.A. Section 2284 on _____, 1956 upon the said motion and the complaint herein and upon the report and order of the Interstate Commerce Commission dated July 6, 1955 made in the proceedings before the Interstate Commerce Commission entitled: "The Greyhound Corporation—Control; Pacific Greyhound Lines—Control; Golden Gate Transit Lines—Purchase (Portion)—Pacific Greyhound Lines, Docket No. MC-F-5643", and "Application of Pacific Greyhound Lines for a certificate of public convenience and necessity over certain routes in California, Docket No. MC-1511 (Sub-No. 103)", and the plaintiffs having appeared in opposition to said motion by _____, Esq., their attorney(s), and the moving parties having appeared by Allan P. Matthew, Esq., their attorney, and the motion having been heard and considered by the Court, and submitted to the Court for decision, and it appearing to the Court that said motion of intervening defendants to dismiss the complaint herein should be granted and that said complaint should be dismissed with prejudice;

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that the complaint herein be and it is hereby dis-

missed with prejudice; that the plaintiffs be, and each of [fol. 83] them is, hereby denied all relief against said intervening defendants; and that said intervening defendants do have and recover from plaintiffs their costs herein, taxed in the amount of \$.....

Done In Open Court this day of, 1956.

.....
Judge

.....
Judge

.....
Judge

[fol. 84] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION OF INTERVENING DEFENDANTS TO DISMISS THE
COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED—Filed January 23, 1956

[fol. 85] Statement of the Case

The complaint herein seeks annulment of an order of the Interstate Commerce Commission, entered upon the joint application of the defendants in intervention under Section 5(2) of the Interstate Commerce Act, authorizing (a) Pacific Greyhound Lines to transfer certain properties and operating rights to Golden Gate Transit Lines, (b) the acquisition of control of Golden Gate Transit Lines by Pacific Greyhound Lines through ownership of capital stock and (c) control of Golden Gate Transit Lines by The Greyhound Corporation through Pacific Greyhound

Lines. Copies of the report and order of the Commission are annexed to the complaint as Exhibits A and B, respectively.

Pacific Greyhound Lines is a common carrier of passengers by motor vehicle in both interstate and intrastate commerce, in the seven western states; The Greyhound Corporation controls Pacific Greyhound Lines through ownership of a majority of its capital stock; and Golden Gate Transit Lines is a newly organized corporation authorized by its articles to engage in the transportation of passengers by motor vehicle. Golden Gate Transit Lines is not presently an operating common carrier, but it will become such upon consummation of the transaction authorized by the Commission's order. The operating rights to be transferred from Pacific Greyhound Lines to Golden Gate Transit Lines include both intrastate and interstate services, and comprehend local operations for distances up to 25 or 30 miles in the San Francisco Bay area, styled by the Commission "commuter operations". (Exhibit A, Sheet 4)

For convenience, these three corporations will hereafter sometimes be styled "Pacific", "Greyhound", and "Golden Gate", respectively.

[fol. 86]

The Issue

The complaint herein tenders a single issue, and this is an issue of law. The sole challenge directed to the Commission's order appears in paragraph X of the complaint which, tersely summarized, alleges that the transactions described in the applications before the Commission and authorized by the Commission's order are not within the scope of Section 5 of the Interstate Commerce Act in that Golden Gate is not presently a "carrier", and that the Commission exceeded its jurisdiction in authorizing the transfer by Pacific of certain properties and operating rights to Golden Gate and the acquisition of control of Golden Gate by Pacific through ownership of capital stock. Such was plaintiffs' contention in opposing the applications before the Commission, and the Commission disposed of that issue in the following terms (Sheets 17-18, Exhibit A):

"The Union, the Counties, and the Commuter Associations collectively question the jurisdiction of this Commission over the proposed transaction under section 5 on the ground that Golden Gate is not a 'carrier' as defined in the act, that it must first acquire the status of a 'carrier' before jurisdiction attaches under section 5, and that the proposed transaction therefore, is not within the scope of section 5(2)(a)(i) which may be authorized. It is apparent that if the transaction were accomplished without our prior authority it would be in violation of section 5(4). Jurisdiction is determined on the basis of facts existing at consummation, and Greyhound proposes to acquire control of Golden Gate concurrently with its becoming a carrier through the purchase. Jurisdiction has been asserted in numerous similar cases and is clear under section 5. *Columbia Motor Service Co.—Purchase—Columbia Terms. Co.*, 35 M.C.C. 531. Jurisdiction over a transaction which is subject to section 5 is exclusive and plenary under the plain language of paragraph 11 of section 5, and, upon our approval of such a transaction, the applicants would have full power to 'carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority'."

The Commission's holding is plainly correct as we shall now undertake to show.

[fol. 87]

I.

The Commission's Jurisdiction to Approve or Disapprove a Proposed Transaction Under Section 5(2) of the Act Is to Be Determined Upon the Basis of Facts Which Will Exist Upon Consummation of the Transaction.

As heretofore noted, Golden Gate is not presently an operating common carrier. This is recognized in the following statement excerpted from Sheet 5 of the Commission's report:

"Golden Gate, which was incorporated on May 7, 1953, has engaged in no business activities and is not now a motor carrier".

Golden Gate could not engage in the services contemplated by the applications, nor could Pacific acquire control of Golden Gate by stock ownership, until authorized by the Commission. That the Commission's jurisdiction necessarily includes the exercise of its authority to these ends, including jurisdiction as to a carrier "resulting" from the transaction so authorized, is plainly declared by statutory provision as well as by all reported authority. We deal first with the statute.

The authority exercised by the Commission in the instant case is derived from Section 5(2)(a) of the Act, which provides, *inter alia*, that it shall be lawful, with the approval and authorization of the Commission,

"for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * *"

Section 5(11) of the Act declares that

"The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in *or resulting from any transaction approved by the Commission thereunder*, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority;" (Emphasis supplied)

[fol. 88] Thus the statute does not restrict the exercise of the Commission's jurisdiction to transactions between *existing common-carriers only*. On the contrary, the jurisdiction conferred by the statute expressly extends to any carrier or corporation "*resulting from any transaction approved by the Commission*." It is plain that Golden Gate will be a carrier "resulting" from the transaction here approved by the Commission. Advisedly, and necessarily, Congress left no such hiatus in the Commission's authority as is here urged by plaintiffs.

Nothing beyond this is needed. In the absence of ambiguity in the statutory terms there is no occasion for resort to legislative history. It may be of some interest, nevertheless, to refer briefly to a significant feature of the legislative history of the Transportation Act of 1940 which brought the statutory provisions into their present form. The following appears in the second Conference Committee report on the Transportation Act of 1940, speaking of the bill (S. 2009) as finally passed:

"The House amendment in section 8 and the Senate bill in section 49 provided for the revision of the provisions of section 5 of the Interstate Commerce Act relating to consolidations, mergers, acquisitions of control, etc., making such revised section apply to all types of carriers subject, *and proposed to be made subject*, to the Interstate Commerce Act. As a necessary incident, the repeal of section 213 (relating to unifications, etc., in case of motor carriers) was provided for." (House Report No. 2832, 76th Cong., 3rd Sess., Aug. 7, 1940, contained in 5 H. Misc. Reps., p. 68.) (Emphasis supplied)

Thus the legislative intent concurs with the statutory declaration.

The decisions of Court and Commission are in accord. In literally scores of cases the Commission has ruled in conformity with its ruling in the instant case, and judicial pronouncements are in no respect discordant therewith. The following are representative:

[fol. 89] *Commission Decisions*

Columbia Motor Service Co.—Purchase, 35 M.C.C. 531, 534 (1940)

Takin—Purchase, 37 M.C.C. 626, 627 (1941)

A. & W. Motor Lines—Purchase, 38 M.C.C. 407 (1942)

Interstate Motor Freight System, Inc.—Purchase, 39 M.C.C. 207; 208 (1943)

Hannon—Control, 39 M.C.C. 620, 622 (1944)

Transit, Inc.—Purchase, 50 M.C.C. 433, 434 (1948)

Baggett Transp. Co.—Purchase, 57 M.C.C. 690, 703 (1951)

Detroit and Cleveland Navigation Company—Control, 58 M.C.C. 599, 606 (1952)

Gehlhaus and Hollobinko—Control, 60 M.C.C. 167, 169 (1954)

Fox Purchase, 261 I.C.C. 95, 100 (1945)

Federal Barge Lines, Inc., 285 I.C.C. 439, 443-444 (1953)

Southern Pacific Company Reincorporation, 267 I.C.C. 523 (1947)*

Chicago Great Western Railway Company, et al., Reincorporation, etc., Finance Docket No. 19028 and No. 19029 (November 18, 1955)*

Court Decisions.

Pan American Airways Co. v. Civil Aeronautics Board, 121 F.2d 810 (C.A. 2d, 1941)

National Air Freight Forwarding Corp. v. Civil Aeronautics Board, 197 F.2d 384 (C.A.D.C., 1952)

Continental Southern Lines, Inc. v. Civil Aeronautics Board, 197 F.2d 397 (C.A.D.C., 1952) cert. den., 344 U.S. 831

General Transp. Co. v. United States, 65 F. Supp. 981, 984 (D. Mass., 1946) aff'd per curiam, 329 U.S. 668

[fol. 90] *Baggett Transp. Co. v. United States*, 116 F. Supp. 167, 170 (N.D. Ala., 1953)

* The reports of the Commission in these proceedings plainly exemplify the jurisdictional void which would result from approval of the plaintiffs' contention in the instant proceeding. In both of these cases the Commission authorized transfer of the properties and operating rights of a carrier by rail to a newly organized Delaware corporation. According to the essential philosophy of the plaintiffs herein the orders of the Commission approving the transfer were void, and therefore state laws would not have been superseded by Section 5(11). But the transfers were made and the two "resulting" Delaware corporations are now operating as common carriers.

We need not comment upon the Commission decisions beyond observing that they consistently hold that jurisdiction exists in dealing with transactions of this immediate character. The Court decisions are fewer in number, and may be reviewed briefly at this point.

Section 408(a) of the Civil Aeronautics Act is virtually correlative with Section 5(2)(a) of the Interstate Commerce Act, both provisions being directed to a common objective.

In

Pan American Airways Co. v. Civil Aeronautics Board, 121 F.2d 810 (C.A. 2d, 1941)

issue was raised as to the authority of the Civil Aeronautics Board to authorize a newly organized corporation to engage in operations as an air carrier and to authorize control of such air carrier by American Export Lines, Inc., a common carrier by water. The Court of Appeals ruled that the necessary authority was in the Civil Aeronautics Board under Section 408(a). Speaking by Judge Augustus N. Hand the Court said:

"The Board, with one of its members dissenting, dismissed the application upon the ground that Section 408(a)(5) 'applies to cases involving the control of air carriers only where the acquisition of control of a corporate entity occurs at a time when that entity is already an air carrier.' This seems to us an unduly literal interpretation of subdivision (5). In our opinion 'to acquire control of any air carrier in any manner whatsoever' is to take all steps involved in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources, with a certificate authorizing operation. Any other interpretation would enable a steamship company, by organizing a subsidiary for air carriage, to escape the requirement of Section 408(b) . . ." (p. 815)

Each of the decisions in

National Air Freight Forwarding Corp. v. Civil Aeronautics Board, 197 F.2d 384 (C.A.D.C., 1952)

[fol. 91] and

Continental Southern Lines, Inc. v. Civil Aeronautics Board, 197 F.2d 397 (C.A.D.C., 1952) cert. den., 344 U.S. 831

is in accord and expressly follows the *Pan American* decision.

In

General Transportation Co. v. United States, 65 F. Supp. 981 (D. Mass., 1946) aff'd per curiam, 329 U.S. 668

action was brought to set aside an order of the Interstate Commerce Commission approving the purchase of certain operating rights. The contention was that Hardy, the vendor, had abandoned his motor carrier operations prior to the date of the Commission's order authorizing the transfer of his operating rights to the vendee, and that the Commission therefore had no jurisdiction under Section 5(2)(a) to approve the application. However, the United States District Court for the District of Massachusetts found no merit in this contention inasmuch as the vendor's operating certificate had not been revoked at the time when the order of approval was issued. The Commission's jurisdiction was upheld notwithstanding that vendor, having abandoned his operations, no longer was precisely within the definition of a "common carrier by motor vehicle".

Compare

Baggett Transp. Co. v. United States, 116 F. Supp. 167 (N.D. Ala., 1953)

where the Court said:

"It must be acknowledged that the jurisdiction of the Commission must arise from the Act of its own creation and is not one which it is free to exercise or abdicate ex proprio motu. This court must now assume the task of construing for itself the provisions of Section 5(2) of the Act, wherein all of the parties to this litigation agree that the grant of jurisdiction resides

if, indeed, it does exist. That is not to say, however, that this section must be wrenched from its context and that the court should blind itself to the congressional effort to integrate into the vast, national transportation scheme the fragmentary but essential operations of intrastate motor carriers." (p. 170)

It was held that the operations of a carrier engaged in intrastate and interstate commerce solely within a single state under the second proviso in Section 206(a) of the Interstate Commerce Act came within Section 5(2) of the Act and that such operating rights could not be transferred to another carrier without the approval and authorization of the Commission.

No judicial ruling or expression of contrary import has come to our attention.

II.

Acceptance of Plaintiffs' Contention Would Devitalize the Commission's Authority Under Section 5(2) of the Act in Important Respects and Would Afford a Means for Evasion of the Statutory Objective

If the exercise of the Commission's authority were confined to common carriers presently existing, excluding carriers "resulting" from transactions submitted for the Commission's approval, an ominous void in jurisdiction would be opened. This is recognized in the opinion of the Court of Appeals for the District of Columbia in *National Air Freight Forwarding Corp. v. Civil Aeronautics Board*, heretofore cited. Addressing itself specifically to the opportunity which would be afforded for successful evasion of the statutory objective, if the Commission's authority were to be so restricted, the Court said:

"Since such a company is not an air carrier until a certificate has been issued, it would appear at first blush that its relationships to other types of carriers are not subject to the restriction of Sec. 408. It has been held, however; in *Pan-American Airways Co. v. Civil Aeronautics Board*, 2 Cir., 1941, 121 F.2d 810,

that the very process of certification brings the control relationships between the newly certificated air carrier [fol. 93] and its parent within Sec. 408. Otherwise a common carrier seeking entry into the air transportation field would be able to evade Sec. 408 merely by organizing a subsidiary and causing it to apply for a certificate of public convenience and necessity under Sec. 401. We agree with the Pan-American decision that it would be unwise for the Board to close its eyes to the fact that with completion of the certification process, there would be in existence an air-surface carrier control relationship which important segments of the Act were designed to regulate." (p. 386)

The Interstate Commerce Commission has repeatedly called attention to dangers of this character. For example, in

Raymond Bros. Motor Transportation, Inc.—Purchase, 37 M.C.C. 431, 433 (1941),

the Commission said:

"Where, as in the instant case, a transaction involving purchase of the properties of a motor carrier is subject to the requirements of section 5, no part of such transaction may be lawfully consummated without our prior approval. To find otherwise would leave carriers free, especially in cases where their operations duplicate each other, or are substantially duplicate, to secure a monopoly, without the necessity of our first considering the desirability of the transaction in the public interest, merely by the device of acquiring the intrastate rights and physical properties of a vendor motor carrier (or several vendors), the latter agreeing to abandon operations in interstate or foreign commerce." (p. 433)

See also:

Wilson Storage and Transfer Co.—Purchase, 36 M.C.C. 221, 227 (1940)

Texas, New Mexico and Oklahoma Coaches, Inc.—Purchase, 55 M.C.C. 269, 275 (1948).

Mooney—Control, 56 M.C.C. 771, 781 (1950); 60 M.C.C. 103 (1954)

Bekins—Control, 65 M.C.C. 56, 59 (1955)

[fol. 94]

III.

The Jurisdiction of the Interstate Commerce Commission Under Section 5 of the Act Is "Exclusive and Plenary," Comprehends Intrastate as Well as Interstate Operations, and Expressly Negatives the Exercise of Any Authority on the Part of the State

As heretofore noted, Section 5(11) of the Act declares that "The authority conferred by this Section shall be exclusive and plenary," and also provides that transactions authorized by the Commission under its terms may be carried into effect "without invoking any approval under State authority." Of necessity, when interstate and intrastate services and transactions are related and commingled, the Federal authority over both is complete and paramount. As said by the Supreme Court of the United States in

Houston East & West Texas Railway Co. v. United States, 234 U.S. 342, 351-2 (1914):

"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

That Section 5(11) effectively supersedes state laws inconsistent therewith has been authoritatively determined by the Supreme Court of the United States:

Seaboard Air Line Railroad Co. v. Daniel, 333 U.S. 118 (1948)

Schwabacher v. United States, 334 U.S. 182 (1948)

Thompson v. Texas Mexican Railway Co., 328 U.S. 134 (1946)

See also:

Kansas City Southern Ry. Co. v. Daniel, 180 F.2d 910 (C.A. 5th, 1950)

New England Greyhound Lines v. Powers, 108 F. Supp. 953, 957 (D. Rhode Island, 1952)

[fol. 95] In the latter recent decision, the United-States District Court for the District of Rhode Island upheld the Commission's exercise of authority under Section 5 whereby transfer of an intrastate motor carrier certificate was approved, notwithstanding a conflict with the statute and constitution of Rhode Island. The District Court ruled that such power and authority were in the Interstate Commerce Commission by virtue of Section 5 of the Act in the following terms (p. 957):

"The Court finds therefore that the Interstate Commerce Commission had the power and authority to issue its Report and Order of February 13, 1951, with reference to the plaintiff and the intervenor, although both are motor carriers, and although the laws to be superceded are state laws."

The legislative history of Section 5 of the Interstate Commerce Act demonstrates that in adopting the Transportation Act of 1940 Congress intended to have transactions such as that here proposed treated as part of a national problem to which a national and uniform policy was to be applied by the Interstate Commerce Commission, and by that Commission only, within and by means of the statutory framework enacted as Section 5 of the Interstate Commerce Act.

Baggett Transp. Co. v. United States, 116 F. Supp. 167, 170 (N.D. Ala., 1953)

National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C.A., note preceding Section 1

Report of Committee of Three, House Document No. 583, 75th Cong., 3rd Sess., 1938, contained in 2 H. Misc. Docs. 19, 41, 44

Report of Committee of Six, From Hearings on H.R. 2531, House Committee on Interstate and

Foreign Commerce, 76th Cong., 1st Sess., 1939, Vol. 1, pp. 259-60. See also pages 261 and 262 of this report.

Senate Report on S. 2009, Senate Report No. 433, 76th Cong., 1st Sess., May 16, 1939, contained in 2 Sen. Misc. Reps., pp. 1, 2. See also pages 2, 3, 4 and 6 of this report.

[fol. 96] *House Report on Substitute for S. 2009*, House Report No. 1217, 76th Cong., 1st Sess., July 18, 1939, contained in 6 H. Misc. Reps., pp. 3-4, 10.

Conclusion

The complaint herein fails to state a claim upon which relief can be granted and should therefore be dismissed.

Respectfully submitted,

Allan P. Matthew, Gerald H. Trautman, 1500 Balfour Building, San Francisco 4, California; Douglas Brookman, 1815 Mills Tower, San Francisco 4, California, Attorneys for Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation, Defendants in Intervention.

McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California, Of Counsel.

[fol. 97] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

NOTICE OF MOTION OF INTERVENING DEFENDANTS MOTION TO
DISMISS COMPLAINT—Filed January 23, 1956

[fol. 98] Stanley N. Barnes, James E. Kilday, John H. D. Wigger, Department of Justice, Washington 25, D. C.; Lloyd H. Burke, United States Attorney, Post Office Building, Seventh and Mission Streets, San Francisco, California, Attorneys for Defendant, The United States of America.

To:

Spurgeon Avakian, W. O. Weissich, Francis W. Collins, Financial Center Building, Oakland 12, California; Jack Robertson, Keating Building, Menlo Park, California, Attorneys for Plaintiffs.

Robert Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorney for Defendant, Interstate Commerce Commission.

You will please take notice that on Thursday, February 23, 1956 at 10:00 o'clock A.M. or as soon thereafter as counsel may be heard in the courtroom of the Honorable Oliver J. Carter, in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, intervening defendants, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation will bring on for hearing before the above entitled Court the aforesaid Motion to Dismiss Complaint for Failure to State a Claim Upon Which Relief Can Be Granted.

Dated at San Francisco, California, January 20, 1956.

Allan P. Matthew, Gerald H. Trautman, 1500 Balfour Building, San Francisco 4, California; Douglas Brookman, 1815 Mills Tower, San Francisco 4, California, Attorneys for Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation, Defendants in Intervention.

McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California, Of Counsel.

[fol. 99] Certificate of service by mail of Motion to Dismiss Complaint, Memorandum of Points in Support of Motion to Dismiss Complaint, Draft of Proposed Judgment of Dismissal and Notice of motion (omitted in printing).

[fol. 101] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

NOTICE OF JOINT MOTION BY U.S. AND I.C.C. FOR JUDGMENT
ON PLEADINGS—Filed February 2, 1956

To the Plaintiffs and Defendants in Intervention and their
respective attorneys in this cause:

Please Take Notice that at 10 a.m. on February 23, 1956,
or whenever the hearing is held on the motion of Defendants
in Intervention to dismiss the complaint in this cause for
failure to state a claim upon which relief can be granted, the
[fol. 102] attorneys for the Defendants United States of
America and Interstate Commerce Commission will jointly
move the Court for judgment on the pleadings in favor of
said Defendants and against the Plaintiffs herein upon the
reasons and authorities hereinafter specified.

Reasons and Authorities

This joint motion for judgment on the pleadings is based
on Rule 12(c) of the Federal Rules of Civil Procedure and
the following:

1. The present notice, and reasons and authorities;
2. The complaint and attached exhibits showing the pro-
ceedings before the Defendant Interstate Commerce
Commission from which the present cause arose;
3. The joint answer of the Defendants United States of
America and Interstate Commerce Commission.

The various papers on file herein show that there is no
issue of fact presented by the pleadings, but solely a ques-
tion of law concerning the jurisdiction of the Defendant
Interstate Commerce Commission to issue the order com-
plained of by the Plaintiffs.

The aforesaid Defendants respectfully submit that said question of law should be resolved on the grounds stated in said papers and that a judgment on the pleadings should accordingly be granted in their behalf and against the Plaintiffs, the latter to pay the costs of the action.

An appropriate draft of judgment will be submitted to the Court and all parties of record herein prior to the hearing on this motion.

[fol. 103] Dated: February 2, 1956.

Lloyd H. Burke, United States Attorney, By: s/ William B. Spohn, Assistant United States Attorney,
On behalf of the defendants, United States of America and Interstate Commerce Commission.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 104] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS—
Filed February 17, 1956

To the Defendants and Defendants in Intervention Named
Above and to their respective attorneys:

You and each of you will please take notice that on February 23, 1956, at 10:00 a.m., in the Courtroom of the Honorable Oliver Carter, District Judge, in the United States Post Office Building in San Francisco, or at such other time or place as the Court might designate, the plaintiffs will move the Court for judgment on the pleadings in favor of plaintiffs for the reason that the pleadings of the various [fol. 105] parties show that there is no question of fact involved in the case, and that the sole question presented is one of law which should be determined in favor of plaintiffs.

This motion will be made pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and on the papers on file

herein and will be supported by the brief heretofore filed by plaintiffs in opposition to the motions of the various defendants for dismissal and for judgment on the pleadings and on oral argument to be presented to the Court.

An appropriate draft of judgment will be submitted to the Court and all parties of record prior to the hearing on this motion.

Dated this 16th day of February, 1956.

Spurgeon Avakian, Jack Robertson, By Spurgeon
Avakian, Attorneys for Plaintiffs.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 106] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

DRAFT OF JUDGMENT ON THE PLEADINGS PROPOSED BY THE
DEFENDANTS UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION

Judgment on the Pleadings

The motion of the Defendants United States of America and Interstate Commerce Commission for judgment in their favor on the pleadings, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, having come on for hearing before the Court of three judges specially constituted, pursuant to Section 2284 of Title 28, United States Code, on, 1956, and the motion having been heard on argument and brief and considered by the Court on the entire record, and then submitted for decision, and it appearing to the Court that said motion should be granted, and that the complaint should be dismissed with prejudice;

It Is Hereby Ordered, Adjudged, and Decreed that:

1. The motion for judgment in favor of the Defendants United States of America and Interstate Commerce

Commission on the pleadings be, and it is hereby granted;

2. The complaint be, and it is hereby dismissed with prejudice;
3. The Plaintiffs be, and each of them is hereby denied all relief against the said Defendants; and
4. The said Defendants do have and recover from the Plaintiffs their costs herein, taxed in the amount of \$.....

Done in Open Court this day of, 1956.

.....
Judge

.....
Judge

.....
Judge

[fol. 108] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 111] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

STIPULATION OF DISMISSAL AS TO AMALGAMATED ASSOCIATION
OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EM-
PLOYEES OF AMERICA WITH PREJUDICE—Filed February
21, 1956

Pursuant to Rule 41, Subdivision (a) (1) (ii) of the
Federal Rules of Civil Procedure, it is hereby stipulated
that the above entitled action of plaintiff Amalgamated
Association of Street, Electric Railway and Motor Coach
[fol. 112] Employees of America, Divisions 1055, 1222, 1223,
1225, and 1471, and said plaintiff's complaint filed therein

be and the same are hereby dismissed with prejudice as against all of the defendants named in said complaint and the defendants in intervention.

Dated: February 21, 1956.

Jack Robertson, Attorneys for Plaintiffs.

John H. D. Wigger, Attorneys for defendant United States of America.

John H. D. Wigger, on behalf of the Interstate Commerce Commission, Attorney for defendant Interstate Commerce Commission.

Allan P. Matthew, Gerald H. Trautman, Douglas Brookman, Attorneys for defendants in Intervention.

[fol. 113] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 34985

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY
FEDERATION OF COMMUTER CLUBS, CONTRA COSTA COUNTY
COMMUTERS ASSOCIATION and AMALGAMATED ASSOCIATION
OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EM-
PLOYEES OF AMERICA, Divisions 1055, 1222, 1223, 1225 and
1471, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, Defendants.

ORDER OF DISMISSAL WITH PREJUDICE—February 23, 1956.

Pursuant to the dismissal and stipulation on file herein,
it is hereby ordered that the above entitled action of plain-

tiff Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Divisions 1055, 1222, 1223, 1225 and 1471, and said plaintiff's complaint filed therein be and the same are hereby dismissed with prejudice as against all of the defendants named in the complaint and the defendants in intervention.

Dated: February 23, 1956.

/s/ Oliver J. Carter, United States District Judge.

[fol. 114] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

1 Civil Action No. 34985

[Title omitted]

MOTION OF PLAINTIFF FOR LEAVE TO AMEND COMPLAINT—
Filed February 28, 1956.

Plaintiffs County of Marin, County of Contra Costa, Marin County Federation of Commuter Clubs, and Contra Costa County Commuters Association respectfully move the Court for leave to amend their complaint on file herein by adding subparagraph (d) to Paragraph X thereof, and by adding a new Paragraph XI, as set forth in the proposed Amendment filed and served herewith.

This motion is made pursuant to Rule 15 of the Federal Rules of Civil Procedure and is supported by the Memorandum in Support of Motion for Leave to Amend Complaint, which is filed and served herewith.

Respectfully submitted,

/s/ Spurgeon Avakian, Attorney for Plaintiffs

[fol. 115] Certificate of Service (omitted in printing).

[fol. 116] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

AMENDMENT TO COMPLAINT

Plaintiffs County of Marin, County of Contra Costa, Marin County Federation of Commuter Clubs, and Contra Costa County Commuters Association amend their complaint on file herein by adding subparagraph (d) to Paragraph X thereof, and by adding a new Paragraph XI, as follows:

X.

(d) The transactions described in said application and authorized in said order are not consistent with the public interest, and the finding of the Interstate Commerce Commission that said transactions will be consistent with the public interest is not supported by substantial evidence, and is in fact contrary to the evidence, for the following reasons, among others:

(1) There is no finding that Golden Gate Transit Lines will be financially able to perform the [fol. 117] operations in question; and, to the extent that such a finding may be implied from the report of the Interstate Commerce Commission, there is no substantial evidence to support such implied finding;

(2) The proposed financial structure of Golden Gate Transit Lines is insufficient and inadequate, and the provision in said report and order whereby Pacific Greyhound Lines is to supply Golden Gate Transit Lines with a cash investment of only \$250,000.00 is not sufficient to protect the public against discontinuance of the operations as a result of financial insolvency;

(3) There is no substantial evidence to support the finding, or implied finding, that the intrastate

operations in question constitute a burden on the interstate operations of Pacific Greyhound Lines; and, on the contrary, the evidence affirmatively shows that any losses on the operations in question have been fully offset by the revenue received by Pacific Greyhound Lines from its other intrastate operations in California, and that the total intrastate operations of Pacific Greyhound Lines in California have been conducted at rates which have returned it a reasonable profit;

- (4) There is no substantial evidence to support the implied finding that the California Public Utilities Commission has determined the fares of Pacific Greyhound Lines for the operations in question "in the light of Pacific's systemwide operations and revenues"; and, on the contrary, [fol. 118] the evidence affirmatively shows that, to the extent the California Public Utilities Commission has considered operations and revenues of Pacific Greyhound Lines other than those involved in the local operations in question, it has limited such consideration to the intrastate operations performed by Pacific Greyhound Lines in California;
- (5) There is no substantial evidence to support the finding that the negotiation of employment contracts with the union has in the past been made difficult because the terms applicable to local drivers have been embraced in a single contract applicable to intercity drivers as well, and that such difficulty would be alleviated by the transfer of the local operations in question and the consequent separation of labor negotiations for the two classes of employees; and, on the contrary, notwithstanding said finding, Pacific Greyhound Lines and Golden Gate Transit Lines, on or about February 21, 1956, entered into agreements with the union which provide that, if the proposed transaction is consum-

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mated, employees of Pacific Greyhound Lines and Golden Gate Transit Lines will be covered by the same employment contracts, and employees of Pacific Greyhound Lines who transfer to Golden Gate Transit Lines will have the privilege to transfer back to Pacific Greyhound Lines without loss of seniority;

- (6) There is no substantial evidence to support the implied finding that the alleged managerial efficiencies which would result from the proposed transactions could not be achieved as well by creating a separate operating division as by creating a separate subsidiary corporation;
- (7) There is no substantial evidence to support the finding that there has been a decline in Pacific Greyhound Lines' long-haul traffic; and, on the contrary, there has been an increase in said traffic;
- (8) There is no substantial evidence to show that, when all the factors affecting the public interest are weighed and balanced, the proposed transaction will protect, promote, or safeguard the public interest, or will provide for the best and most economical use of the transportation facilities involved.

XI.

The Interstate Commerce Commission abused its discretion in denying plaintiffs' Petition for Rehearing and Reconsideration, a copy of which is attached hereto as Exhibit E, for the following reasons, among others:

- (a) Said Petition shows that, subsequent to the issuance of the Interstate Commerce Commission order in question, the chief witness appearing for applicants before the Interstate Commerce Commission (Defendants in Intervention here) gave testimony before the California Public Utilities Commission substantially contradictory to his testimony before the In-

terstate Commerce Commission on a material issue, namely, the working capital requirements for the operations in question, in that said witness testified [fol. 120] before the Interstate Commerce Commission that \$150,000.00 would be sufficient working capital; whereas he testified before the California Public Utilities Commission that the required working capital was equal to the cash operating expenses for one month (which, applied to this case, exceeds \$320,000.00);

- (b) Said Petition shows that the \$250,000.00 cash investment required by the Interstate Commerce Commission as a condition of its order is insufficient to provide the necessary working capital for the operations in question.

Respectfully submitted,

/s/ Spurgeon. Avakian, Financial Center Building,
Oakland 12, California, Attorney for Plaintiffs.

W. O. Weissich, District Attorney, County of Marin.
Francis W. Collins, District Attorney, County of Contra
Costa, Of Counsel.

[fol. 122] EXHIBIT "E"—TO AMENDMENT TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

• • • • •

Docket No. MC-F-5643

In the Matter of

THE GREYHOUND CORPORATION—CONTROL; PACIFIC GREY-
HOUND LINES—CONTROL; GOLDEN GATE TRANSIT LINES—
PURCHASE (PORTION)—PACIFIC GREYHOUND LINES

Docket No. MC-1511

(Sub No. 103)

Application of Pacific Greyhound Lines, a corporation, San
Francisco, California, Common Carrier, Regular Routes,
for continuance of operations over portions of routes
involved in the sale.

PETITION FOR REHEARING AND RECONSIDERATION

OF

COUNTY OF MARIN

COUNTY OF CONTRA COSTA

MARIN COUNTY FEDERATION OF COMMUTER CLUBS

CONTRA COSTA COUNTY COMMUTERS ASSOCIATION

Protestants

The protestants named above hereby petition the Com-
mission to grant a rehearing in this matter, and to re-
consider its decision and order served on July 15, 1955
(dated July 6, 1955), upon the following grounds and for
the following reasons:

1. *Rehearing.* Protestants request an opportunity to pre-
sent additional evidence not previously available to them,
showing that on July 28, 1955, before the California Public
Utilities Commission, applicant Pacific Greyhound Lines
(hereinafter called Greyhound) took the position that its
working capital requirements for performing the services
involved in this proceeding are substantially in excess both
[fol. 123] of the sum of \$150,000.00 which Greyhound con-

tended in this proceeding would be adequate and of the sum of \$250,000.00 which this Commission found in said decision and order would be adequate. The evidence sought to be presented consists in substance of the testimony of Mr. M. C. Frailey, Vice-President of Greyhound, before the California Public Utilities Commission on July 28, 1955, in Application No. 34362, a verbatim transcript of which is attached to this petition as Exhibit A. Said testimony shows that, as applied to this proceeding, the working capital requirements would be in excess of \$320,000.00.

Protestants had no opportunity to present such evidence before because Mr. Frailey's testimony was not given until July 28, 1955.

2. *Reconsideration.* Protestants also request this Commission to reconsider the findings and conclusion set forth in the following exceptions:

(a) Protestants take exception to the finding on Sheets 28 and 29 of the mimeographed decision that the proposed transfer will be consistent with the public interest if the cash payment by Greyhound to Golden Gate Transit Lines (hereinafter called Golden Gate) is \$250,000.00.

(b) Protestants take exception to the finding on Sheet 26 of the mimeographed decision that a cash investment in Golden Gate by Greyhound of \$250,000.00 would be adequate for Golden Gate's working capital requirements.

[fol. 124] (c) Protestants take exception to the conclusion on Sheet 28 of the mimeographed decision that the proposed transaction is within the scope of Section 5 of the Interstate Commerce Act.

In support of this petition, protestants respectfully show as follows:

1. *Greyhound's Change of Position on Working Capital Requirements.*

Contrary to its representation to the Interstate Commerce Commission in this proceeding that the \$150,000.00 in cash to be transferred by Greyhound to Golden Gate

would provide it with adequate working capital to carry on the transferred operations, Greyhound took the position before the California Public Utilities Commission on July 28, 1955, that the working capital required to perform these same services is equal to one month's cash expenses (which would amount to \$321,183.00 in this case) and that such amount should be included in the rate base for purposes of determining fair and reasonable rates.

This contention to the California Commission does more than conflict sharply with Greyhound's position in this case. It also undermines this Commission's conclusion that \$250,000.00 would provide adequate working capital.

Greyhound's contention, before the California Public Utilities Commission was taken in the course of public hearings on Greyhound's Application No. 34362 for increase in Greyhound's fares between San Francisco and Marin [fol. 125] County, which is one of the services involved in this proceeding. Greyhound's Vice-President, Mr. M. C. Frailey, who was also the principal witness of applicants in this proceeding, presented an exhibit setting forth the rate base on which its rate of return should be calculated. This exhibit showed working capital requirements for 1955 of \$132,700.00 for the Marin County services and \$158,000.00 for the Peninsula services. (The latter include some operations not covered by this application, but that is more than offset by the Contra Costa County operations which were not included in said exhibit but which are involved in this proceeding.)

Mr. Frailey's testimony on this point is set forth *verbatim* in the attached Exhibit A. It shows unequivocally that the working capital needs are equal to one month's costs of operation (exclusive of depreciation and other non-cash items), and that this represents the average investment in prepayments, such as required insurance premiums and other deposits and tax prepayments.

Exhibit 16 in this case shows average monthly cash expenses for the operation in question of \$321,183.00.*

* Total 1953 expenses of \$4,013,600.00, less depreciation of \$159,400.00, equals cash expenses of \$3,854,200.00. That divided by 12 equals \$321,183.00. This is probably less than actual 1955 costs, since there have been increases in wages and other costs during the intervening period.

In this proceeding, Mr. Frailey testified categorically that the provision for \$150,000.00 in working capital was "very definitely" adequate (Tr. 93), and that *even without a fare increase* Golden Gate could carry on these operations for a year or two without becoming bankrupt (Tr. 140).

[fol. 126] Moreover, Mr. Frailey testified that it would be advisable for Golden Gate to purchase 190 new fare boxes, at a cost of \$500.00 each (Tr. 152), which would require an additional capital outlay of \$95,000.00.

In its rate increase applications presently pending before the California Public Utilities Commission for its Peninsula and Marin County services** Greyhound has submitted exhibits in which it contends that, under its present fare structure (which includes an increase granted by the California Commission in November, 1954, it will lose \$311,500.00 in the Marin and \$66,100.00 in the Peninsula services during the year ending June 30, 1956.

How, then, is Golden Gate going to continue in business even for one year, if it starts out with only \$250,000.00? Even assuming that the rates are set at a fully compensatory basis, it would still be necessary to have an initial cash investment of at least \$500,000.00, consisting of the following, if the operation is to start on a sound financial basis:

Working capital	\$321,000.00
Annual excess of equipment obligations over depreciation	39,000.00
Estimate of first year outlay for cash fare boxes	40,000.00
Unusual expenses incident to operation by a new company	100,000.00
	<hr/>
	\$500,000.00

[fol. 127] But before the California Public Utilities Commission on July 28, 1955, Mr. Frailey testified that one month's cash expenditures, or over \$320,000.00 as applied

** No application for fare increase has been filed with respect to the Contra Costa service, which the Public Utilities Commission found in 1951 was being operated at an annual loss of \$10,800.00. *In re Pacific Greyhound Lines, et al.* (1951) 50 Cal. P.U.C. 650, 682 (in evidence as Ex. 21 in this case).

to this case, is necessary as working capital to cover normal prepayments, and that "the minute you don't have working capital you are not very sound" (Ex. A, p. 2).

This Commission should permit this evidence to be shown in this case, and should require Greyhound to submit a satisfactory explanation, if any there can be, for this striking inconsistency before permitting Greyhound to transfer its operations to Golden Gate.

2. *The Adequacy of \$250,000.00 Working Capital.*

Even apart from Greyhound's own assertion, before the California Public Utilities Commission, that its working capital requirements would exceed \$320,000.00, we urge this Commission to re-examine its conclusion that \$250,000.00 in cash would provide sufficient working capital.

The \$250,000.00 would be insufficient even to meet the normal average prepayments, to say nothing of "the general ability to have cash and funds available to meet your obligations and pay your bills, and generally be in a sound financial shape to operate your business" (see Mr. Frailex's testimony, Ex. A, p. 2).

In addition, Golden Gate will have annual instalment obligations on busses of \$163,761.00 for several years into the future (Ex. 12). Since the annual depreciation on these busses will be only \$124,700.00 (Ex. 16); the cash outlay from capital funds will be \$39,000.00 per year.

[fol. 128] 3. *The Applicability of Section 5.* We do not intend to reargue herein at length the legal question of whether Section 5 of the Interstate Commerce Act applies to this kind of a transaction. We refer the Commission instead to the argument set forth in our initial Brief in this matter, at pages 3-7, and do not go beyond a reiteration of our contention that the statute is limited to transfers between existing carriers and does not apply to a transfer to a would-be carrier, such as Golden Gate.

WHEREFORE, protestants request the Commission to reopen this matter for the presentation of additional testimony, to reconsider its decision, and after such further hearing and reconsideration to deny the application.

Respectfully submitted,

/s/ Spurgeon Avakian
 SPURGEON AVAKIAN
 Attorney for County of Marin,
 County of Contra Costa,
 Marin County Federation of
 Commuter Clubs, Contra
 Costa County Commuters
 Association,
 Protestants.

W. O. WEISSICH
 District Attorney
 County of Marin

FRANCIS W. COLLINS
 District Attorney
 County of Contra Costa
 Of Counsel.

[fol. 129]

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Petition for Rehearing and Reconsideration to be served on each of the parties hereto, by deposit thereof on August 9, 1955, in the United States mail at Oakland, California, with first class postage fully prepaid, addressed to counsel for each of said parties as follows:

ALLAN P. MATTHEW and GERALD TRAUTMAN
 1400 Balfour Building
 San Francisco, California
 (Attorneys for Applicants)

JACK ROBERTSON
 Keating Building
 Menlo Park, California

(Attorney for Amalgamated Association of Street,
 Electric Railway and Motor Coach Employees of
 America; Divisions 1055, 1222, 1223, 1225, and
 1471, Protestant)

Dated: August 9, 1955.

/s/ Spurgeon Avakian
 SPURGEON AVAKIAN

[fol. 130] EXHIBIT "A" TO EXHIBIT "E"

TESTIMONY OF M. C. FRAILEY, VICE-PRESIDENT OF PACIFIC GREYHOUND LINES, BEFORE THE CALIFORNIA PUBLIC UTILITIES COMMISSION ON JULY 28, 1955, IN APPLICATION NO. 34362 (questions by Mr. Avakian):

Q. Would you turn to page 6 of Exhibit R-4.

This deals with a computation of rate base, as you will notice.

A. Yes, sir.

Q. Do you have the page before you?

A. Yes, sir.

Q. In your opinion is it proper to include working capital in your rate base?

A. Surely is.

Q. Why is that?

A. Because I think you have to have working capital to run any business.

Q. Well, how—

A. And run a business on a sound basis.

Q. Well, how about this figure of \$129,400 as working capital for 1954 and \$132,700 as working capital for 1955 in the Marin County services.

In your judgment is that a proper figure to include?

A. Yes.

Q. In other words, you think you actually need that amount of working capital to run this Marin service?

A. Well, we had to have working capital to start it, and frankly we have to have working capital to pay the losses. If we didn't have something we would be out of business shortly.

Q. Well, you prepared this page of your exhibit as the [fol. 131] rate base, and for purposes of rate base have you limited yourself to the working capital that you need to carry on your business?

A. In my opinion it is a reasonable charge to include for working capital.

Q. What type of needs are there for this working capital?

A. Well, the general ability to have cash and funds available to meet your obligations and pay your bills, and

generally be in a sound financial shape to operate your business, and the minute you don't have working capital you are not very sound.

Q. Now, you have designated this as "Average investment in required insurance premiums and other deposits, tax prepayments, etc."

Are there any substantial items that are covered by the "etc."?

A. No.

This represents, what you might say is prepayments normally classified in a balance sheet.

Q. Are your working capital requirements for Marin determined on the basis of allocation of Division 5 working capital, or are they computed in some other way?

A. No, they are computed on the basis of Marin County expenses, excluding depreciation and such items of non-cash items.

Q. I note——

[fol. 132] A. It represents one month's operating expenses.

Q. I note from Exhibit R-9 that there is a figure of \$158,000 shown as working capital for the Peninsula for 1955.

Does that figure, plus the Marin County in Exhibit R-4 represent your total Division 5 requirements?

A. Yes, it would be on whichever basis it was worked out.

It was the costs, as I have explained them, one month's costs, less your depreciation and non-cash items, based on the figures of each area.

Q. You feel quite confident that these are proper amounts to be set up as working capital requirements?

A. Yes, I feel that definitely they are. The company should have working capital. This company would have to provide working capital; a new company will have to provide working capital to go in, and I am sure that if you were talking about a new company you would want to provide working capital to be sound and substantial, and I think we are entitled to it.

Mr. Trautman: So that the record will be right, the Peninsula figure you gave, Mr. Avakian, included other operations than Divisions 5, as I guess you know.

Mr. Avakian: No, I didn't.

Are they substantial in character?

The Witness: They include the Division 4 operations [fol. 133] between San Francisco and San Jose, and also out to Half Moon Bay and that area.

Q. In terms of—

A. But the same principle was used.

Q. In terms of the proportions, does the San Francisco and San Jose volume of business loom large or small in the total operations from which that \$158,000 figure comes?

A. It is sizeable.

Q. About what proportion of it?

A. I don't know off hand, but it is sizeable.

But irrespective, the same principle was used in both Marin County and in the so-called Peninsula, plus this other, in setting up working capital.

[fol. 134]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

MEMORANDUM OF PLAINTIFF IN SUPPORT OF MOTION FOR
LEAVE TO AMEND COMPLAINT—Filed February 28, 1956

Rule 15 of the Federal Rules of Civil Procedure sets forth a liberal policy of permitting amendments to pleadings, to the end that a controversy may be fully tried on all issues.

Subsection (a) reads in part as follows:

“(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the

adverse party; and leave shall be freely given when justice so requires. . . ."

Subsection (b) permits amendments to conform to the evidence, even after judgment.

Subsection (d) even authorizes supplemental pleadings to set forth transactions occurring since the date of the prior pleadings.

[fol. 135] The application of Rule 15 by both trial and appellate courts shows a uniform spirit of liberality in granting leave to amend. Even though the granting of such leave after a responsive pleading has been filed* is a matter of judicial discretion, there have been numerous reversals on appeal where strong affirmative reasons for denying leave to amend are not shown.

The case of *Lloyd v. United Liquors Corp.* (CA 6, 1953) 203 F.2d 789, is typical. Plaintiff's counsel had stated, on argument of motions for dismissal and summary judgment in an anti-trust treble-damage action, that he wanted to reserve the right to amend. Thereafter, the court granted the defense motions, and refused plaintiff permission to amend the complaint. In reversing the order denying leave to amend, the appellate court emphasized the liberal policy of permitting amendments. Answering the argument that amendment of the complaint would have delayed final disposition of the case by the trial court, the appellate court quoted with approval (203 F.2d at 793) the following language from *Doehler Metal Furniture Co. v. United States* (CA 2, 1945) 149 F.2d 130, 135:

"But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay."

See, also:

Maryland Casualty Co. v. Rickenbaker (CA 4, 1944) 146 F.2d 751;

* It may be noted, parenthetically, that Defendants in Intervention have not yet filed a responsive pleading in this case, although the United States and the Interstate Commerce Commission have done so.

Atlantic Coast Line R. Co. v. Mims (CA 5, 1952)
199 F.2d 582;

Rogers v. Girard Trust Co. (CA 6, 1947) 159 F.2d
239.

In a three-judge court case involving review of an Interstate Commerce Commission order, the plaintiff was permitted to amend his complaint on the day of the trial to set [fol. 136] forth a completely new ground. See *L. A. Tucker Truck Lines, Inc. v. United States* (E.D. Mo. 1951) 100 F. Supp. 432, 434, where the court said:

"Amendments to pleadings are largely discretionary with the courts and the courts have repeatedly held that amendments to pleadings should be allowed with great liberality at any stage of the proceedings unless violative of settled law or prejudicial to rights of opposing parties. The courts have been very liberal in permitting amendments where it is necessary to bring about a furtherance of justice."

The timeliness of the application is significant only on the question of whether the opposing parties will be substantially prejudiced. Delay of itself is not ground for reversal, nor is there any requirement of diligence or excusable neglect (as there would be in a motion to set aside a judgment).

Armstrong Cork Co. v. Patterson-Sargent Co.
(D.C. Ohio, 1950) 10 F.R.D. 534;

Markert v. Swift & Co., Inc. (CA 2, 1949) 173 F.2d
517;

Maryland Casualty Co. v. Rickenbaker (CA 4,
1944) 146 F.2d 751.

In the *Maryland Casualty Co.* case, the trial court had denied leave to amend the complaint during the trial, for the reason that, with proper preparation of the case, plaintiff could have proposed the amendment before the trial. In rejecting this as a ground for denial, and holding that the amendment should have been allowed, the appellate court said (146 F.2d at 753):

"The more important question for the court's consideration, at the time that the motion to amend was made, was the effect which it would have, if granted, upon the rights of the parties and the proper disposition of the business of the court."

Similarly, in *McDowall v. Orr Felt & Blanket Co.* (CA 6, 1944) 146 F.2d 136, where the trial court had refused leave to amend on the ground that the issues had been settled at a previously-held pre-trial conference, the appellate court reversed with the following observation (146 F.2d at 137):

[fol. 137] "The only question which confronts us is whether appellant should have been permitted to file his amended complaint, and it is here unnecessary to discuss any legal or factual questions with regard to the content of the proposed amended pleading. Rule 15 of the Federal Rules of Civil Procedure provides that, in the circumstances disclosed in this case, a party may amend his pleading only by leave of court . . . 'and leave shall be freely given when justice so requires.' Subsection (a). The rule continues, confirms, and emphasizes the practice in effect prior to its adoption, in which liberality in amendment was encouraged and favored, where no prejudice or disadvantage was suffered by the opposing side."

We can perceive no substantial prejudice to any of the defendants from permitting plaintiff to raise its additional grounds of attack on the Interstate Commerce Commission order at this time, as distinguished from having raised them at the original trial. The case is not yet fully at issue, since Defendants in Intervention have not filed their answer. The fact that the authority granted by the Interstate Commerce Commission must be exercised within 180 days from the effective date of the order (which is presently October 19, 1955) does not present any real problem, since this court can (and on request presumably would) stay the effective date until final disposition of the case. It may be noted that, although this action was filed on October 18, 1955, Defendants in Intervention did not make their motion

to intervene until January 9, 1956, and, as pointed out above, have not yet filed their answer.

The only inconvenience to the defendants, in reality, is that of answering new grounds after the sufficiency of the original complaint has been challenged on legal grounds. As the cases cited herein show, that is not a valid ground for refusing leave to amend; on the contrary, the preferred policy is to allow leave to amend if the original complaint is subject to dismissal on legal grounds.

[fol. 138] Nor is there any hardship on the court different from that normally present in such situations. The legal question as to the scope of Section 5 of the Interstate Commerce Act is one which will remain in the case even if the proposed amendment is allowed, and the time devoted to argument of that question will not, therefore, have been wasted; rather, if the amendment is allowed, there will probably be no need to reargue the Section 5 issue, and the case can be submitted for final decision after trial of the additional issues raised by the amendment.

The proposed amendment to the complaint raises substantial questions going to the merits and validity of the order under review. The case is one of considerable public importance and should not be disposed of without consideration of these matters. In order that the court might be more fully aware of the nature of these questions, we have set forth the grounds with considerably more specificity than would be necessary as a matter of law.

This amendment should be permitted, in accordance with the principles enunciated in the cases cited above and embodied in Rule 15.

Respectfully submitted,

/s/ Spurgeon Avakian, Attorney for Plaintiffs.

[fol. 139]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

MEMORANDUM OF THE UNITED STATES AND THE INTERSTATE
COMMERCE COMMISSION IN OPPOSITION TO MOTION FOR
LEAVE TO AMEND COMPLAINT—Filed March 8, 1956

The United States and the Interstate Commerce Commission strongly oppose the motion on the ground that the Congressional purpose that suits attacking orders of the Commission should be speedily determined would be frustrated if parties are permitted to amend their complaints in circumstances such as these, where the case is ready to be [fol. 140] finally disposed of,¹ briefs have been exchanged, and the Court has heard the case.

Furthermore, in this case, it is manifestly clear that there are no equities which would require the sacrifice of this Congressional purpose. On the contrary, in their "Memorandum in Support of Motion For Leave to Amend Complaint" the plaintiffs do not even attempt to excuse their last minute effort to change the whole nature of their complaint, which if successful would result in delaying the judicial determination of the validity of the Commission's action and the carrying out of the Commission's order.

If the plaintiffs should succeed in their efforts, a ready technique is available for those who seek to hamstring the Commission's action by making what is in effect a *seriatim* attack on its order. Parties could, and undoubtedly would, initially attack an order of the Commission on one ground, then wait until the Court has assembled to amend their complaint and attack the order on another ground. By following such tactics, they would obtain the very goal they seek,

¹ In their brief in opposition to motion of defendants for judgment on the pleadings, and motion of defendants in intervention to dismiss, the plaintiffs stated that the sole question in the case was whether the Commission had jurisdiction over the transaction. (Page 3)

namely, delay; which would be inevitable if such a procedure were followed, because additional time would be required by the defendants to prepare to meet the new issues raised and because of the fact that the Court could reassemble only at such a time as would be convenient for all of the members [fol. 141] thereof. This sort of procedure would be an inexcusable imposition on the Court, and a device for impeding the Congressional desire for a speedy determination of suits to set aside orders of the Commission.

The plaintiffs filed their complaint on October 18, 1955. There never was and never could be any dispute as to the fact that there was only one issue raised by the complaint, namely, the Commission's jurisdiction. In spite of this fact, the plaintiffs waited until the Court had assembled on the morning of the hearing to finally dispose of the case to indicate for the first time their desire to amend the complaint, stating that they wanted to be permitted to amend in the future if the Court should decide against them on their original complaint. At this time they stated that they wanted to amend simply in order to attack the sufficiency of the Commission's findings in light of the fact that the Union and Pacific Greyhound Lines had just entered into an agreement whereby the employees of Golden Gate Transit Lines would for a period of time be made parties to the agreement which Pacific Greyhound Lines had with the union. However, in their proposed amendment which they filed on February 27, 1956, the plaintiffs attempt to broaden their action so as to allege not only that the findings of the Commission fail to support the order, but also that the evidence fails to support the findings and that the Commission abused its discretion in denying their petition for reconsideration. In other words, under their proposed amendment the plaintiffs would enlarge their cause of action from a limited attack based on the Commission's lack of jurisdiction [fol. 142] to an all-out assault upon the Commission's action. If permitted this amendment would require the Court to examine not only the findings of the Commission, but the entire record before the Commission in order to ascertain whether the findings are supported by evidence in the record as a whole.

In the memorandum in support of their motion for leave to amend, the plaintiffs apparently take the position that delay in submitting a motion to amend is of no significance at all under Rule 15 of the Federal Rules of Civil Procedure unless the opposing parties would be substantially prejudiced and that no such prejudice will result if their motion is granted. It is submitted that if the motion is granted there will be great prejudice to the defendants and that the plaintiffs misconstrue the effect of Rule 15. While this rule is to be construed liberally and while it vests broad discretion in the court in permitting an amendment to a pleading, it has been recognized that a motion to amend is not to be granted as a matter of course, but should only be freely given "when justice so requires." See for example *Schick v. Finch*, 8 F.R.D. 639, 640 (S.D. N.Y., 1944); *Friedman v. Trans America Corp.*, 5 F.R.D. 115, 116 (D. Del, 1946). In the *Finch* case, the Court in denying the defendant's motion for leave to serve an amended answer sums up the law on this point as follows (p. 640):

"Rule 15(a), Federal Rules of Civil Procedure, 28 U.S.C.A., prescribes a liberal policy in granting leave to amend. A liberal policy does not mean the absence of all restraint. Were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave [fol. 143] should not be granted. The instant case, I believe, falls into such a category. It is made on the very eve of trial. It proposes to change allegations which go to the heart of the issue without assigning an adequate cause for the modification. It is concerned with matters which, if true, must have been within the defendant's knowledge when the controversy arose."

Thus, it may be said generally that a motion to amend a complaint should not be granted as a matter of course, but must be determined in light of all the circumstances. It is submitted that the circumstances in this case do not support the plaintiffs' motion. They do not and cannot claim that they did not have full knowledge of the facts involved in the case at the time the complaint was filed on October 18, 1955,

or that their delay in seeking to amend was due to some oversight, inadvertence or excusable neglect. This is not a situation where amendment is sought for the purpose of having the pleadings conform to the evidence. This is not even the situation where parties change counsel in the course of litigation and new counsel seeks to amend on the ground that original counsel overlooked some fact or theory of law. Furthermore, this is not an instance where counsel for the plaintiffs was unfamiliar with the nature of the proceedings before the administrative body at the time the complaint was filed and seeks to amend in order to correct an oversight. Counsel for the plaintiffs have been in this case not simply since the filing of the complaint in October of 1955; they also represented the plaintiffs during the proceedings before the Interstate Commerce Commission, and, therefore, were thoroughly familiar with the whole matter. [fol. 144] It is axiomatic that events which take place after a Commission proceeding has terminated may not be considered by the Court on review of the Commission's order, and that such review is limited strictly to the record of the proceeding had before the Commission.

In *Lang Transportation Corp. v. United States, et al.*, 75 F.Supp. 915 (S.D. Cal., 1948), the statutory three-judge District Court said (p. 922, note 5):

"Suits under the Urgent Deficiencies Act to set aside orders of the Interstate Commerce Commission are proceedings for judicial review upon the record before the Commission and are not trials de novo; hence evidence aliunde or de hors the record is inadmissible in the Federal Court. *United States v. L. & N. R. Co.*, 1914, 235 U.S. 314; *Tagg Brothers & Moorehead v. United States*, 1930, 280 U.S. 420, 443-5; *Acker v. United States*, 1936, 298 U.S. 426, 434; *National Broadcasting Company v. United States*, 1943, 319 U.S. 190."

The Supreme Court, in *Tagg Bros. v. United States*, 280 U.S. 420 (1930), said (pp. 443-5):

" * * * The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the pro-

ceedings before him,—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now. *Louisville & Nashville R.R. Co. v. United States*, 245 U.S. 463, 466—compare *Liscio v. Campbell*, 34 F.(2d) 646, 647; and see *Prendergrast v. New York Telephone Co.*, 262 U.S. 43, 50 and *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 289. On all issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceeding. To allow his findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal as the rate making body.”

[fol. 145] A statutory three-judge District Court, in *Sakis v. United States*, 103 F.Supp. 292 (D.C. for D.C., 1952); refused to admit and consider certain evidence which was not before the Commission in the proceeding under review. The court said (p. 313):

“The Court ruled that the present case requires the Court to review the ruling of the Commission in the light of the evidence which was before the Commission. The Court does not believe that this proceeding is de novo in character and construes the Court’s function and responsibility to be exclusively that of reviewing the case upon the basis of the record actually before the Commission at the time the Commission made the ruling.”

Likewise, a statutory three-judge court for the Western District of Missouri, in its recent decision (October 3, 1955) in *Southern Kansas Greyhound Lines, Inc. et al. v. United States*, et al., 134 F.Supp. 502, said (pp. 510-511):

“In this connection, plaintiffs also complain that on April 1, 1954 and prior to the joint board’s recommended report and order herein, a contract was made between Trails and Union Transportation Company under which one McRae, managing partner of Union Transportation Company, took over management and

control of Trails, and that the Commission knew this, from its records in Control Proceeding No. MC-F-5754, before Division 5 of the Commission rendered its report and order ~~herein~~, and that this presented an additional question of fitness and ability of Union Transportation Company and of McRae upon which the Commission was required to, but did not, make a finding. * * * That matter is not properly before us on this review, as this proceeding is in no sense de novo and we are confined to the record as made before the Commission. *United States v. L&N R. Co.*, 235 U.S. 314; *Tagg Bros. & Moorehead v. United States*, 280 U.S. 420, 443-5; *Acker v. United States*, 298 U.S. 426, 434; *National Broadcasting Company v. United States*, 319 U.S. 190, and plaintiff's offer in evidence, upon the hearing before [fol. 146] us, of a transcript of that control proceeding is rejected and excluded."

Moreover, it appears from an examination of the petition for reconsideration filed by the plaintiff with the Commission on August 11, 1955, that no attack was made therein on the adequacy of the Commission's findings or the sufficiency of the evidence to support said findings. Apparently the only references to findings are those which take exception to (a) the finding that the proposed transfer will be consistent with the public interest; (b) to the finding that a cash investment of \$250,000 by Greyhound in Golden Gate would be adequate, and (c) to the finding that the proposed transaction is within the scope of section 5 of the Act. Clear judicial expression supports the doctrine that the failure of the plaintiff to press objections so as to permit consideration by the Commission bars review thereof when raised for the first time in court action. *United States v. Hancock Truck Lines, Inc.*, 324 U.S. 774, 778-79; *General Transportation Co., et al. v. United States, et al.*, 65 F.Supp. 981, 984, affirmed per curiam, 329 U.S. 668.

[fol. 147] In the memorandum in support of their motion for leave to amend, the plaintiffs rely heavily on *L. A. Tucker Truck Lines v. United States*, 100 F.Supp. 432 (E.D. Mo., Oct. 18, 1951), rev. 344 U.S. 33 (1952). There the District Court granted the plaintiff's motion made on the

day of trial for leave to file an amended petition in order to allege that the Commission's order was void since the examiner that had heard the case did not meet the qualifications of the Administrative Procedure Act. The Supreme Court had just recently held in *Riss & Co. Inc. v. United States*, 341 U.S. 907 (April 16, 1951), that the examiners for the Interstate Commerce Commission were subject to the provisions of the Administrative Procedure Act. In reversing the judgment on the ground that the plaintiff had waived its right to an examiner appointed pursuant to the provisions of the Administrative Procedure Act, the Supreme Court in the *Tucker* case noted that its decision in the *Riss* case had apparently prompted the plaintiff to raise the point about the examiner's qualifications. (Footnote 4, page 36).

Thus, the circumstances in the *Tucker* case for allowing the plaintiff to amend are not present here. The amendment there permitted the plaintiff to take advantage of a recent decision of the Supreme Court. The amendment raised simply a question of law, which was of vital importance since there was considerable support in the cases for the proposition that if the examiner was subject to the Administrative Procedure Act, and a hearing was conducted before a non-qualified examiner, the Commission would lose jurisdiction and any action it took would be void *ab initio*. The amendment in that case did not open [fol. 148] up for the first time the question as to whether the Commission's findings were supported by the evidence. None of the circumstances in the *Tucker* case are present here.

If the plaintiffs are permitted to amend their complaint delay is inevitable in spite of the Congressional policy that this type of case be speedily determined. In *United States v. Griffin*, 303 U.S. 226 (1937), the Supreme Court, speaking through Mr. Justice Brandeis, noted that Congress had established a special method for judicial review of orders of the Interstate Commerce Commission as a means in part to expedite such litigation. Thus, the Supreme Court observed that "upon both the trial court and the Supreme Court rests the obligation to give the case precedence over others" and that, in providing for this special type of judi-

cial review, Congress sought "to avert the delays ordinarily incident to litigation." (232-233).

It is respectfully submitted that the petition of the plaintiffs should be denied in view of the Congressional policy to avert delays in this type of case and because of plaintiffs' failure to justify their delay in seeking to amend the complaint.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Motion for Leave to Amend Complaint should be denied.

Respectfully submitted,

Stanley N. Barnes, Assistant Attorney General.
Lloyd H. Burke, United States Attorney.

/s/ James E. Kilday, /s/ John H. D. Wigger, Attorneys, Department of Justice, Washington 25, D. C., Attorneys for the United States.

/s/ Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorney for the Interstate Commerce Commission.

[fol. 149] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 150] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

MEMORANDUM OF DEFENDANTS IN INTERVENTION IN
OPPOSITION TO MOTION FOR LEAVE TO AMEND
COMPLAINT—Filed March 10, 1956

[fol. 151] Introductory

In the view of defendants in intervention the plaintiffs' motion for leave to amend the complaint herein is wholly

without merit and is properly to be characterized as fantastic. This motion is nothing other than an imposition upon the Court and should be summarily denied.

Plaintiffs ask leave to add subparagraph (d) to paragraph X of the complaint and to add a new paragraph XI thereto. The effect of this proposed amendment is to challenge the ultimate finding by the Interstate Commerce Commission that the transaction described in the Commission's report dated July 6, 1955, is consistent with the public interest and to contend that the Commission abused its discretion in denying plaintiffs' petition for rehearing and reconsideration. The original complaint contained no challenge of this ultimate finding nor did it allege such an abuse of discretion. The complaint raised a single issue of law, whether said transaction was within the scope of Section 5 of the Interstate Commerce Act. This question has been briefed, argued and submitted to the Court for decision. The only issue raised by the complaint has been fully tried and now plaintiffs seek to raise other grounds for challenging the Commission's order herein.

The motion has only one objective—an unwarranted delay in the disposition of the action so that plaintiffs may continue to be subsidized by the other patrons of Greyhound. Counsel for plaintiffs knew at the time he filed the complaint (see affidavit attached hereto as Appendix A), and he knows now, that the Commission's findings are supported by ample evidence. Beyond question, all of the new allegations could readily have been made in the complaint [fol. 152] as initially filed—and would have been made if they had any merit.

Justice Requires That Leave to Amend Be Denied

A. Leave to amend should not be granted after trial.

We wish to make one point clear at the outset. This Court was not hearing merely preliminary motions on February 23, 1956. It was trying the only issue raised by the complaint, namely, the issue of jurisdiction. In short, plaintiffs have had their trial upon the pending complaint. It was expected by counsel for plaintiffs that the Court would "make a final disposition of the matter one way or the other

after hearing on the 23rd." * (Plaintiffs' letter of February 16, 1956, to Clerk of Court)

At the time of the trial plaintiffs asked for a conditional privilege to amend the complaint. They wanted permission to amend the complaint if plaintiffs should lose on the jurisdictional issue. In this connection counsel for plaintiffs said:

"But as a result of this, may it please the Court, it is my intention during the course of the morning, and perhaps it is better to mention it now, to beg leave of the Court in the event the determination of the Court should be against us on the legal question raised, to give us permission to amend the complaint to set forth as an additional ground the challenge of the finding of the Commission that the order in question is consistent with the public interest." (Tr. 5)

[fol. 153] Later he said:

"For that reason, we would like permission at this time, although we had not intended to raise this question before,—we would like permission at this time in the event this Court should determine against us on the legal question of jurisdiction to amend the complaint to challenge the public interest finding also." (Tr. 8)

Still later he added:

"But the motion that I make is that in the event the determination of the Court on the motions pending here today should be adverse to the plaintiffs, the plaintiffs be given leave, pursuant to Rule 15 (a) of the Federal Rules of Civil Procedure . . ." (Tr. 14)

* Now counsel for plaintiffs contends that the case is not even at issue. (p. 4) The answer of the defendants United States of America and Interstate Commerce Commission was filed on December 15, 1955, the motion to intervene was filed on December 29, 1955, and the motion of the defendants in intervention to dismiss the complaint was filed on January 23, 1956. These defendants are not required to file any additional pleadings in response to the pending complaint and do not intend to do so. The case is at issue on the pending complaint.

This would indeed be a novel and intriguing way to try a lawsuit: file a complaint; have a trial of the issue raised by the complaint; if an adverse determination is in prospect, amend to set forth an additional issue; have a trial on the issue raised by the amendment; if this appears to be unsuccessful, amend again; and so on. We have no doubt that the resourceful counsel for the plaintiffs would be able to find some way to keep such "installment plan" litigation going indefinitely.

At the trial the Court informed counsel for plaintiffs that such conditional permission could not be granted (Tr. 14), and the Court was plainly correct. We have been unable to find any authority which would sanction the procedure suggested by counsel for plaintiffs.

The initial excuse for the proposal to amend the complaint was that the defendants in intervention had entered into an agreement which, according to the contention of counsel for plaintiffs, in some way affects the validity of certain findings of the Commission. While it is clear from the authorities that this agreement can not [fol. 154] properly be considered by this Court, it is incumbent upon us, in view of counsel's representations, to set the record straight. The agreement with the Union was entered into pursuant to the direction of the commission that the parties would be expected to negotiate such an agreement for the protection of the employees. The agreement is for a three-year term and its objective is to provide a three-year settling-down period during which time the employees affected by the proposed transaction can reach a determination as to whether they desire to work for Pacific Greyhound Lines or Golden Gate Transit Lines. During that three-year period their seniority and other terms and conditions of employment are protected. It is contemplated that at the end of the term of the contract those employees who desire to work for Pacific Greyhound Lines will be working for Pacific Greyhound Lines, those employees who desire to work for Golden Gate Transit Lines will be working for Golden Gate, and that there will be no further occasion for transfers as between the two companies.

Several days after the trial plaintiffs filed a written motion for leave to amend their complaint. The proposed amendment goes far beyond anything suggested to the Court at the time of the trial. The Union agreement is largely ignored, and instead, a wholesale assault is made upon the findings of the Commission and its denial of rehearing. Again, we have found no authority permitting such amendment. Leave to amend *after trial* should not be given except to conform to proof and obviously, plaintiffs' proposed amendment is not for this purpose.

It is understandable that courts do not favor amendments after trial. If a litigant who has lost confidence in [fol. 155] his original grounds of complaint were permitted to amend to inject additional issues after trial, the burden upon the courts as well as the parties would be intolerable. Such tactics were condemned in *Hart v. Knox County*, 79 F. Supp. 654 (E.D. Tenn., 1948) where the court, in denying a motion to amend the complaint after defendants' motion for summary judgment had been sustained, said:

"But a different situation is presented here. Plaintiffs would shift their ground and try a new theory of recovery. The effect of the amendment they propose would be not to conform the pleadings to a judgment they have won, but to jeopardize and perhaps to overthrow a judgment they have lost. It is a prime purpose of paragraph (b) to avoid the necessity of new trials because of procedural irregularities, not to set judgments aside and make new trials necessary. If this latter application of the rule were permitted, a losing party, by motions to amend and rehear, could keep a case in court indefinitely, trying one theory of recovery or defense after another, in the hope of finally hitting upon a successful one. Courts draw a dividing line between this use of amendment and those uses aimed at conformity." (p. 658)

B. *Leave to amend should not be granted where the matter was well known to plaintiffs and could have been raised in the original complaint.*

The proposed amendment challenges the sufficiency of the evidence to support the findings of the Commission and

also challenges the action of the Commission in denying plaintiffs' petition for rehearing. All of these matters could have been incorporated in the original complaint, and were in fact considered by counsel for plaintiffs at the time he drafted the original complaint. There is no explanation in any of the papers now filed by plaintiffs as to why these allegations were omitted.

The Federal courts have refused in many instances to allow a party by belated amendment to inject into a case matters which could have been set forth in the initial pleading. [fol. 156] For example, in *Schick v. Finch*, 8 F.R.D. 639 (S.D. N.Y., 1944), the court said at page 640:

"Rule 15(a), Federal Rules of Civil Procedure, 28 U.S.C.A., prescribes a liberal policy in granting leave to amend. A liberal policy does not mean the absence of all restraint. Were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave should not be granted. The instant case, I believe, falls into such a category. *It is made on the very eve of trial. It proposes to change allegations which go to the heart of the issue without assigning an adequate cause for the modification. It is concerned with matters which, if true, must have been within the defendant's knowledge when the controversy arose.*" (Emphasis added).

In the case of *Redmond v. O'Sullivan Rubber Co.*, 10 F.R.D. 536 (W.D. Va., 1944), motion for leave to file an amended answer on the eve of a trial was denied because all of the matter set forth in the amendment could have been included in the original answer. The court said:

"To continue the case further is highly undesirable. . . . *there appears no reason why the defendant could not have included in its original answer all of the matter set out in the proffered amended answer.* The original answer was not hastily filed but, as heretofore stated, was filed after time and that delay was due to the fact, as then stated by the defendant, that it wished to obtain all necessary data for the answer

before preparing it and that the obtaining of this data was the cause of the delay. Even if there were additional matter which it wished to submit as a defense abundant time has occurred since last September to have assembled this without waiting until about six days before the trial to tender an amended answer, which, if permitted, will necessarily result in a further continuance of the case." (p. 538) (Emphasis added)

To the same effect is the case of

Hessian Hills Corp. v. Union Cent. Life Ins. Co., 1 F.R.D. 743 (S.D. N.Y., 1941)

where the court in denying leave to amend said:

"Here the defendant had knowledge of all the facts [fol. 157] for many months prior to this application but apparently waited until the eve of trial to assert its request for relief." (p. 744)

The tactics of plaintiffs obviously stem from a desire to delay the operations of Golden Gate Transit Lines. This Court should not tolerate such delaying tactics, especially in view of the admonition in the law that cases of this character are to be handled with expedition. Counsel for plaintiffs knew at the time he prepared his complaint that he could have raised the issues presented by the proposed amendment. Several months passed and no effort was made to amend the complaint. Then on the day of the trial a conditional amendment of limited character was suggested. After the trial a far-reaching amendment was proposed and without one word of explanation as to why the matters were not incorporated in the initial complaint. There are numerous instances where the Federal courts have refused to permit belated amendments under circumstances much less aggravated than those of the present case. In

Schaad v. New York Life Ins. Co., 79 F. Supp. 463 (E.D. Tenn., 1948),

the court in disallowing an amendment adding new claims stated:

" * * * However, in this instance, an exercise of sound discretion would seem to require that plaintiff's motion be denied. This is solely on the ground that it was not presented until the day of the hearing, was seasonably objected to by defendant and, in the Court's opinion, with good reason." (p. 468)

In

Calhoun County v. Roberts, 148 F. 2d 901 (C.A. 5th, 1945),

a motion to amend the complaint was denied by the District Court. This order was affirmed by the Court of Appeals [fol. 158] which said:

"This relief was clearly an afterthought on the part of the Receiver and called into being an issue entirely foreign to the suit, and, under Rule 15 . . . , its disallowance was within the discretion of the trial court and, no abuse being shown, may not be disturbed on appeal." (pp. 903-4)

The cases of *Carroll v. Pittsburgh Steel Co.*, 103 F. Supp. 788 (W.D. Pa., 1952) and *Banking & Trading Corp. v. Reconstruction Finance Corp.*, 15 F.R.D. 360 (S.D. N.Y., 1954), are to the same effect.

It is true that plaintiffs have cited one case where a plaintiff was permitted to amend its complaint on the day of trial—not after the trial, as in this case. The United States Supreme Court upon review plainly looked with disfavor upon plaintiff's maneuver. It characterized the issue raised by the amendment as "clearly an afterthought." The Court further pointed out that it was brought forward "at the last possible moment" and went on to hold that the point had been waived by failure to assert it earlier in the proceedings. *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). We should think that plaintiffs would find very little comfort in this case.

C. *Leave to amend should not be granted where the defendants will be prejudiced.*

Plaintiffs state that:

"We can perceive no substantial prejudice to any of the defendants from permitting plaintiff to raise its additional grounds of attack on the Interstate Commerce Commission order at this time, as distinguished from having raised them at the original trial." (Plaintiffs' memorandum, p. 4)

[fol. 159] A piecemeal attack (sic) on the Commission's order would never seem to be in the public interest, especially in view of the Congressional mandate for expedited review of the Commission's orders. We can well imagine the burden placed upon Government counsel in defending orders of the Commission if this litigation on the installment plan is permitted. Undoubtedly, Government counsel will speak for themselves.

We desire to stress the serious prejudice which would be experienced by defendants in intervention. Both the Public Utilities Commission and the Interstate Commerce Commission have found that the local operations of Pacific Greyhound Lines have been and are operated at heavy financial losses. A brief excerpt from the Commission's report (Exhibit A to the Complaint, Sheet 12) plainly demonstrates such prejudice caused by further delay herein.

"A pro forma income statement shows that if Golden Gate had conducted the 'local' services, it would have had an estimated net operating loss of \$234,300 for 1953 under then existing effective fares. At the time of the hearing Pacific had pending an application before the California Commission, filed on May 18, 1953, seeking an increase in its fares for operations in the Marin County area and, to a much smaller extent, in another county not here involved. Applicants estimated that the granting of the requested increase would provide additional annual revenue to Golden Gate of \$254,000, thus changing Golden Gate's estimated deficit into an estimated net income of \$19,700.

However, since issuance of the proposed report, the California Commission, on November 4, 1954, authorized an increase which, according to the report of the California Commission attached to applicant's exceptions, will produce estimated additional revenue of about \$84,000 a year. *The California Commission, in granting that increase, recognized that if the then existing fares were continued during the year ending June 30, 1955, an estimated loss of \$389,800 would be sustained for the Marin County operations, and that Pacific's losses for its overall California intrastate operations would be \$1,202,200.* The California Commission explained that although the granted increase still would not provide sufficient revenue to cover the [fol. 160] cost of the Marin County operations, a sharp increase as proposed by Pacific would also fail to place the Marin County operations on a self-sustaining basis, because the law of diminishing returns would cause diversion from Pacific of a substantial part of its commutation patronage. To the extent this additional revenue may be applicable to the Marin County operations, the proportion or amount of which is not indicated, Golden Gate's estimated deficit would be decreased." (Emphasis added)

Thus the California Commission recognized that the Marin operations alone were producing an estimated loss in excess of \$300,000 a year (more than \$800 a day) at a time when Pacific's estimated losses for its over-all intrastate operations would be in excess of \$1,000,000 per year. The removal of this burden on the interstate operations of Pacific Greyhound Lines is one factor which the Commission considered in making its finding that the proposed transaction is consistent with the public interest. Each day of delay postpones the time when this burden may be eliminated and the local operations made self-sustaining.

Conclusion

Defendants in intervention feel that it is nothing other than their duty to challenge the motivation of the pro-

posed amendment. It is so plainly lacking in merit as to call for its summary rejection. Plaintiffs' objective is to delay as long as possible the transaction authorized by the Commission's order.

Pacific Greyhound Lines is daily suffering heavy financial losses by reason of existing conditions from which relief can be afforded with assurance only by taking action in conformity with the Commission's order. In our judgment there should be no unnecessary delay.

[fol. 161] : The motion for leave to amend should be denied and the complaint should be dismissed forthwith.

Respectfully submitted,

Allan P. Matthew, Gerald H. Trautman, 1500 Balfour Building, San Francisco 4, California, Douglas Brookman, 1815 Mills Tower, San Francisco 4, California, Attorneys for Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation, Defendants in Intervention.

McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California, Of Counsel.

[fol. 162] CERTIFICATE OF SERVICE BY MAIL (omitted in printing)

[fol. 164] APPENDIX "A" TO MEMORANDUM

AFFIDAVIT IN OPPOSITION TO MOTION FOR
LEAVE TO AMEND COMPLAINT

[fol. 165] Gerald H. Trautman, being first duly sworn, deposes and says:

That he is one of the attorneys for defendants in intervention in the above entitled proceeding and as such is familiar with the proceedings before this Court as well as the proceedings before the Interstate Commerce Commission in this matter.

That on October 7, 1955, prior to the filing of the complaint in the above entitled action, affiant talked with Spurgeon Avakian, counsel for plaintiffs, concerning the character of the complaint to be filed by him in this proceeding. That at that time said counsel inquired of affiant as to whether the parties to the transaction approved by the Interstate Commerce Commission intended to carry out the transaction prior to a decision of this Court, so that he might know exactly how to frame his complaint. During this conversation, said counsel stated to affiant that he intended by his complaint to raise only the question of the jurisdiction of the Interstate Commerce Commission to approve the transaction under Section 5 of the Interstate Commerce Act and that he did not intend to challenge the findings of the Interstate Commerce Commission upon the ground that they are not supported by the evidence since he did not feel that he could successfully make such an attack. That based upon said conversation, affiant alleges that before the complaint herein was filed counsel for plaintiffs had knowledge of his right to challenge the findings of the Interstate Commerce Commission in his complaint and that he voluntarily elected not to do so.

That subsequently on December 30, 1955, affiant had another conversation with said counsel for plaintiffs concerning the character of the trial to be had in this proceeding, the case then being at issue. That in said conversation affiant and said counsel discussed the necessity of filing with this Court at the time of such trial a certified copy of the record before the Interstate Commerce Commission. That in this connection said counsel for plaintiffs stated to affiant that he saw no reason to produce such a certified copy of the record before the Interstate Commerce Commission and that he did not intend to do so. That affiant agreed with said counsel for plaintiffs that this would be unnecessary inasmuch as the complaint and answer then on file raised only the jurisdictional issue. That based upon said conversation affiant alleges that before the trial herein on February 23, 1956, counsel for plaintiffs had knowledge of his right to produce a certified copy of the record before the Interstate

Commerce Commission at said trial and that he voluntarily elected not to do so.

/s/ Gerald H. Trautman

Subscribed and sworn to before me this 9th day of March, 1956.

Eva L. Nelson, Notary Public, in and for the City and County of San Francisco, State of California.

(Notarial Seal)

My commission expires October 3, 1956.

[fol. 167] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 34985

COUNTY OF MARIN, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION, Defendants,

GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES,
and THE GREYHOUND CORPORATION, Defendants in Inter-
vention.

OPINION—April 12, 1957

Before Healy, Circuit Judge and Harris and Carter, Dis-
trict Judges.

Carter: District Judge.

This action has been brought to restrain the enforce-
ment of, and to set aside an order of the Interstate Com-
merce Commission which approved and authorized a plan
of the Pacific Greyhound Lines to transfer its San Fran-
cisco commuter operation to its new subsidiary, the Golden
Gate Transit Lines, hereinafter referred to as "Pacific"
and "Golden Gate", respectively, Jurisdiction of this Court
is sought under 28 U.S.C. 2325 and 28 U.S.C. 2284. The

complaint attacks the authority of the Commission to make the order of approval, and has been brought by the counties of Marin, Contra Costa, each of which lies across the bay from San Francisco, and two commuter associations. Named as defendants are the United States and the Interstate Commerce Commission, and these parties, after answering, moved for a judgment on the pleadings. Golden Gate, Pacific, and the parent of Pacific, the Greyhound Corporation, all joining as defendants in intervention, have moved to dismiss the complaint for failure to state a claim. [fol. 168]. Each of these motions raise the same question, whether the Commission was correct in ruling that section 5(2)(a) of the Interstate Commerce Act, 49 U.S.C.A. § 5 (2)(a), gave jurisdiction to approve the proposed transaction. That section requires approval of the Commission,

"... for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly to purchase, lease, or contract to operate the properties, or any part thereof, of another; *or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise*; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;" (Emphasis added)

It is the meaning of the italicized portion of the section which is in dispute here. The proposal is to transfer the properties and operating rights used to serve the San Francisco Bay Area commuter service, to Golden Gate, and Pacific would concurrently *acquire control* of Golden Gate by tak-back (sic) all of its capital stock. By the same transaction, Greyhound Corporation, through its ownership of Pacific, would also *acquire control* of Golden Gate. The

plaintiffs claim that this does not come within the italicized portion of Section 5(2)(a) because the section was only intended to cover cases where a carrier or carriers seek to acquire control of another *existing* carrier, and that Golden Gate will not acquire a carrier status until the operating rights of Pacific have actually been transferred to it.

We have no difficulty in finding that the proposed transaction is covered by the language of the section; it merely says that approval of the Commission is required when one carrier acquires control of another. That is precisely what the Greyhound Corporation and Pacific are seeking to do here; although Golden Gate will not attain the status of a carrier until the operating rights of Pacific are transferred to it, neither will the parent corporations acquire control until then, for the properties and operating rights are to be simultaneously exchanged for the stock.

The real thrust in the plaintiffs' argument that the section does not cover the proposed transaction lied (sic) in their contention of legislative purpose in enacting this legislation. It is argued that in enacting Section 5 Congress only intended to cover consolidations, unifications, and mergers of carrier control; that there was no intention to cover the [fol. 169] case of an existing carrier splitting up its operations, which Pacific seeks to do here. This version of the Congressional intention is buttressed by excerpts showing that Congress, in enacting Section 5, as part of the Transportation Act of 1940, 54 Stat. 905, was endeavoring to inject economic strength into failing carriers, by permitting them to combine and consolidate, providing their plans met with certain other tests.

We assume that the dominant (sic) purpose of Section 5(a) was to reach cases in which carriers sought to unite their control. But we think the plaintiffs' version of Congressional (sic) purpose underlying Section 5 is too narrow, and that it ignores the whole regulatory scheme of the Interstate Commerce Act. Section 5(2)(a) was not newly conceived by the Transportation Act of 1940. We find that Section 5 of the Transportation Act of 1920, 41 Stat. 456, contained provisions substantially like those found in the present statute. While the 1920 Act applied only to railroad

carriers, Congress had already determined the necessity of subjecting transactions affecting carrier control to the scrutiny of the Interstate Commerce Commission. In 1948, the Supreme Court reiterated the purpose of the 1920 Act in *Schwabacher v. United States*, 334 U.S. at 182, where it said:

"In a series of decisions on particular problems, this Court defined the general purposes of that Act to be the establishment of a new federal railway policy to insure adequate transportation service by means of securing a fair return on capital devoted to the service, restoration of impaired railroad credit, and regulation of rates, security issues, consolidations and mergers in the interest of the public. The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, *to control rate and capital structures, physical make-up and relations between carriers*, in the light of the public interest in an efficient national transportation system. (Citing cases)." (Emphasis added).

So far as it was the purpose of congress to have the Interstate Commerce Commission control the capital structure, physical make-up and relations between carriers under the power conferred by Section 5, we are unable to read out of the statute the transaction at hand.

We also find support for upholding the jurisdiction of the Commission here in *New York Central Securities Co. v. U. S.*, 287 U.S. 12, (1932). The question was whether Section 5(a) then applying only to Railroad carriers (41 Stat. 456) and requiring Commission approval when one carrier acquired control of another "either under a lease or by the purchase of stock" reached a transaction where a parent corporation leased the properties of its sub-[fol.170] sidiary. The Supreme Court held that the leasing constituted an acquisition of control within the language of the Act, over the argument that the parent already controlled the carrier properties through its ownership of the stock of the subsidiary. There was no new control acquired that did not exist before in a different degree,

but merely a change in the form of the control. The proposal in the instant case is to change the degree or form of control over the properties of the carrier, by transferring them to the subsidiary Golden Gate, and we think that the above holding requires that it be approved by the Commission under the present Section 5(2).

We find no cases construing the pertinent (sic) language of Section 5(2)(a) since it was expanded to include motor carriers, but there are judicial decisions construing comparable provisions in the Civil Aeronautics (sic) Act. Section 408 of that Act (49 U.S.C.A. 488) provides that:

- (a) It shall be unlawful, unless approved by order of the Board as provided in this section (5) for any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever."

In *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F. 2d 810 (C.C.A. 2, 1941), American Export Airlines Inc., organized as a subsidiary to American Export Lines, Inc., a common carrier by water, applied to the Civil Aeronautics Board for a certificate permitting it to do business as an air carrier, and in addition, (sic) approval of control of it by its parent American Export Lines, under the above section. The Board dismissed the application for approval of control, in (sic) the same theory which plaintiffs invoke here, viz., the control provision did not reach a transaction unless the air carrier sought to be controlled was already an air carrier. Judge Hand rejected this interpretation, reversed the dismissal, and remanded the case to the Board, stating:

"This seems to us an unduly literal interpretation of subdivision (5). In our opinion 'to acquire control of any air carrier in any manner whatsoever' is to take all steps involved in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources with a certificate authorizing operation. Any other interpretation would enable

a steamship company, by organizing a subsidiary for air carriage, to escape the requirement of Section 408(b) that the 'Authority shall not enter . . . an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.'"

[fol. 171] The reasoning of Judge Hand is equally applicable here. Section 5(2), subdivision (c) of the Interstate Commerce Act Supplements Section 5(2)(a) in stating:

"In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; . . . (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

If Greyhound is free to make substantial alterations in its corporate structure, to create subsidiaries to take over part of its existing operation, or perhaps to venture into new areas, without the necessity of seeking Commission approval, the function of that body to assure adequate transportation service to the public is unduly restricted.

Finally, we note that the Interstate Commerce Commission itself has, on other occasions, ruled that the type of transaction which Pacific Greyhound proposes is a Section 5 transaction. See: *Columbia Motor Service Co.—Purchase—Columbia Terminals Co.*, 35 M.C.C. 531, and *Consolidated Freightways Inc.—Control—Consolidated Conroy Co.*, 36 M.C.C. 351, which were decided shortly after section 5(2) was enacted into its present form. In each of these cases motor carriers sought and obtained Commission approval to transfer a part of their operation to a newly created corporation, whose carrier status had to await the completion of the transaction. See also: *Takin—Purchase—Takin Bros. Freight Line, Inc.*, 37 M.C.C. 626, and *Gethous & Holobinko—Control*, 60 M.C.C. 167. The

Supreme Court has made itself clear regarding the weight to be given to Commission interpretations of the Interstate Commerce Act. In *United States v. American Trucking Associations*, 310 U.S. 534 (1940) at 549 it said:

"In any case such interpretations are entitled to great weight. This is peculiarly true where the interpretations involve contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

We therefore hold that the Commission was correct in holding that it had jurisdiction to approve the transaction in question, and both motions should be granted.

There remains one further issue to be decided. During the final arguments on the motions to dismiss and for [fol. 172] judgment on the pleadings plaintiffs, County of Marin, County of Contra Costa, Marin County Federation of Commuters Clubs, and Contra Costa Commuters Association, asked for permission to amend the complaint. After the motions had been submitted these plaintiffs formally moved the Court for permission to amend the complaint by adding allegations challenging the findings of the Commission that the transaction between Pacific and Golden Gate was consistent with the public interest, and that the Commission abused its discretion in denying plaintiff's petition for rehearing and reconsideration. The effect of the motion to amend is to inject into the case the completely new issue of the sufficiency of the evidence to support the findings of the Commission. The complaint, as originally framed, raised only the issue of jurisdiction, and the motions to dismiss and for judgment on the pleadings were argued and submitted only on that issue. Plaintiffs concede that the proposed amendment (sic) attempts to raise issues known to them at the time of the hearings on the motions. They argue, however, that under the liberal provisions of Rule 15(a) of the Federal Rules of Civil Procedure the amendments (sic) should be permitted.

The motion for leave to amend is addressed to the sound discretion of the Court, and must be decided upon the

facts and circumstances of each particular case. It would serve no useful purpose to review the many cases dealing with Rule 15. It is sufficient to say that the power of the Court to permit amendment should not be used to completely change the theory of the case after the case has been submitted to the Court on another theory without some showing of lack of knowledge, mistake or inadvertence on the part of the party seeking amendment, or some change of conditions of which that party had no knowledge or control. Plaintiffs have made no such showing here. The motion to amend is denied.

Counsel for defendants and defendants in intervention are directed to prepare and present orders in conformity herewith.

Dated: April 12th, 1957.

/s/ William Healy, Circuit Judge.

/s/ Oliver J. Carter, District Judge.

[fol. 173] NOTE OF JUDGE HARRIS RE CONCURRENCE AND
DISSENT

I concur in the majority opinion upholding the jurisdiction of the Commission. I dissent in the refusal of the Court to grant plaintiffs permission to amend the complaint regarding the issue of the sufficiency of the evidence.

A memorandum of my views to follow hereafter.

Dated: April 12, 1957.

/s/ George B. Harris, District Judge.

[File endorsement omitted]

[fol. 174] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

ORDER EXTENDING TIME TO PRESENT ORDERS—April 17, 1957

Upon motion of the attorneys for the defendants and with good cause shown, the time for the defendants and defen-

dants in intervention to prepare and present orders in conformity with the decision of the three-judge court dated and entered April 12, 1957 in this cause is hereby extended to and including April 29, 1957.

Dated: April 17, 1957

/s/ William Healy, United States Circuit Judge

[fol. 175] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 34985

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY
FEDERATION OF COMMUTER CLUBS, CONTRA COSTA COUNTY
COMMUTERS ASSOCIATION, and AMALGAMATED ASSOCIATION
OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EM-
PLOYEES OF AMERICA, Divisions 1055, 1222, 1223, 1225 and
1471, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, Defendants,

GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES and
THE GREYHOUND CORPORATION, Defendants in Intervention.

CONCURRING AND DISSENTING OPINION OF JUDGE HARRIS—
April 17, 1957

Dated: April 17, 1957.

George B. Harris, United States District Judge.

[fol. 176] Judge Harris, concurring in part and dissenting
in part:

(Defendants in intervention Golden Gate Transit Lines
and Pacific Greyhound Lines shall be hereinafter referred

to as "Golden Gate" and "Pacific" respectively, as in the majority opinion.)

I concur in the majority opinion upholding the jurisdiction of the Commission. I dissent in the refusal of the Court to grant plaintiffs permission to amend the complaint regarding the issue of the sufficiency of the evidence.

The motion to amend the complaint and the proposed amendment itself must be considered in the light of the historical events and proceedings conducted by the defendant in intervention, Pacific, before the California Public Utilities Commission (formerly the Railroad Commission of California).

The granting or refusing to grant leave to amend cannot be viewed in a judicial vacuum, nor can the determination and the exercise of a sound discretion be reached without a regard for the realities, and the background and motives which inspired Pacific to invoke the procedural technique hereafter adverted to.

Particularly is this so by reason of the admission made by Pacific that it invoked the procedure under Section 5(2) (a) of Title 49 U.S.C.A., before the Interstate Commerce Commission, creating Golden Gate, in order to circumvent the rate-making authority and jurisdiction of the California Public Utilities Commission. In short, the foregoing section was availed of as a legal device to avoid not only the proceedings and decisions which will be reviewed immediately hereafter, but as well, the express agreement made by [fol. 177] Pacific, which in turn inured or should inure to the benefit of residents and commuters of the bay area communities involved in this litigation.

Judicial notice may be had of the fact that Pacific has appeared before the California Public Utilities Commission on numerous occasions in connection with its operations in Marin and Sonoma Counties.¹ In 1939 it made its application to replace Northwestern Pacific Railroad which was then serving commuters by means of rail and ferryboat service. When many North Bay residents protested at the proposed change, Pacific assured the California Railroad Commission that it would assume the exclusive transporta-

¹ 42 Ry. Comm. 372 and 661; 50 PUC 650; 53 PUC 634, etc.

tion service on a minimum financial recovery basis. (42 Opinions and Orders of the Railroad Commission of California 661) At page 668 the following language appears in the opinion of the Commission:

"The record, as it now stands, shows conclusively that the Greyhound is the only carrier which is able financially and otherwise, to provide Marin County with a service to take the place of that to be abandoned. It has made a firm offer to substitute its proposed service for that of the Northwestern Pacific in event it is granted authority to serve the entire territory to be abandoned by the rail carrier.

The record shows that the Pacific Greyhound Lines made its proposal not with the thought that it would return the full cost of operation, but that it would realize something over and above the out-of-pocket cost of operation. The inference may be fairly drawn that the decision to embark upon this undertaking was made with some hesitation and only after a long and complete study of its feasibility. It may be that the Pacific Greyhound Lines was influenced to some extent by the fact that if its application were granted and the Northwestern Pacific Railroad authorized to abandon service, the Northwestern Pacific Railroad, a wholly owned subsidiary of the Southern Pacific Company, (1) would be relieved of a substantial continuing out-of-pocket loss. [(1) The Southern Pacific Company owns approximately 39% of the common stock of the Pacific Greyhound Lines]

[fol. 178] "Whatever may have been the underlying reasons which influenced the Greyhound to make this offer is relatively unimportant, as the record leaves no doubt that it was made in good faith and with the avowed purpose of providing Marin County with a satisfactory, adequate, and enduring transportation service. These underlying reasons only become important in evaluating the statement of the Greyhound, heretofore quoted, to the effect that a denial of the right to serve Mill Valley would necessitate a withdrawal of its offer and a resurvey of the entire proposal."

The order of the Commission based upon its pleadings and opinion concluded as a condition for the granting of a certificate of public convenience and necessity that:

"(4) The rights and privileges herein authorized may not be discontinued, sold, leased, transferred, nor assigned unless the written consent of the Railroad Commission to such discontinuance, sale, lease, transfer, or assignment has first been obtained."

At a recent hearing, Pacific admitted that it had agreed to operate without hope of financial reward except the realization of sufficient returns to cover the actual out-of-pocket costs of the North Bay venture.

The foregoing review is significant by reason of the recent Supreme Court decision in *Pacific Gas and Electric Co. v. Sierra Pacific Power Co.*, 350 U.S. 348, decided shortly after the instant ruling of the Interstate Commerce Commission.

In setting aside an order of the Commission and remanding the Pacific Gas and Electric Company case, the Supreme Court held that a public utility may not be relieved of an improvident bargain even though such bargain produces less than a fair rate of return on its investment. The Commission's duty is to protect the *public interest* as distinguished from the "*private interests of the utilities*." A contract is neither unjust nor unreasonable merely because it is unprofitable to the utility. The express agreement of Pacific with the California Railroad Commission dated May 21, 1940, provident or improvident, cannot be ignored.

By parity of reasoning, when the ICC reviews local operations of Pacific it must consider its financial returns in terms of the public interest. Even though income realized from a specific sector is less than a fair rate of return, Pacific is not entitled to relief in the absence of proof of losses (not offset by intrastate revenue), which place a burden on interstate commerce.

Plaintiffs in their proposed amendment to the complaint have sought to point out the frailties in Golden Gate, as well as the avoidance on the part of Pacific of the agreement

² Vol. 53 California Public Utility Commission (sic) Reports 634.

made in the vital proceedings before the California Public Utilities Commission—vital in the sense that the proceedings sought to and did protect the public interest as distinguished from the “private interest of the utilities.” (Cf. *Pacific Gas and Electric Co. v. Sierra Pacific Power Co.*, supra)

The proposed amendment sets forth and challenges the findings of the ICC as to the financial ability of Golden Gate to operate. They charge that their limited capital structure—contributed by Pacific—and the narrow scope of their operations preclude economic success. The amendment also challenges numerous findings pertaining to Golden Gate as a carrier, contending that there is no substantial evidence to show that the local operations will support this carrier. If, in fact, such operations now earn a fair return for Pacific, the latter had no basis for complaining about the intrastate drain on its interstate business and the supposed [fol. 180] burden placed upon interstate passengers.

Plaintiffs’ allegations establish the necessity for a complete hearing and review before this Court. This is especially so in view of the fact that Pacific has undertaken to avoid the consequences of its agreement with the California Public Utilities Commission (see especially pp. 672, 673 of 42 Ry. Comm. of California), by disposing of its local operations to an independent, but wholly owned subsidiary without first obtaining written consent from the California Commission, which is opposed to the transfer.

Under all of the circumstances¹ and in the exercise of a sound and liberal discretion, (Rule 15(a) FRCP), plaintiffs’ motion to amend should be granted, since “justice so requires.”²

¹ Cf. *Breswick & Co. v. United States*, 138 F.Supp. 123, 137, 138.

² It should be observed that no defendant will suffer any substantial prejudice by permitting plaintiffs to amend their complaint. The California Public Utilities Commission granted Pacific a rate increase on its local operations shortly after this matter was argued and submitted to the court.

³ *Armstrong Cork Co. v. Patterson-Sargent Co.*, 10 FRD 534; *McDowall v. Orr Felt & Blanket Co.*, 146 F.2d 136; *Maryland Casualty Co. v. Rickenbaker*, 146 F.2d 751; *Lloyd v. United Liquors Corp.*, 203 F.2d 789; and *L. A. Tucker Truck Lines, Inc. v. United States*, 100 F.Supp. 432.

As a matter of alternative relief, consistent with the Supreme Court decision in *Pacific Gas and Electric Co. v. Sierra Pacific Power Co.*, supra, consideration should be given to a remand of said cause to the Interstate Commerce Commission for further proceedings."

"*U. S. v. United States v. Ohio Power Co.* (Supreme Court) decided April 1, 1957, #312, Oct. Term 1955; *Inland Freight Corp. v. United States*, 60 F.Supp. 520 (9th Cir.); *Clarke v. U. S.*, 101 F.Supp. 587; *Carolina Freight Corp. v. United States*, 38 F.Supp. 549)

[fol. 181] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

COUNTY OF MARIN, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, Defendants.

GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES and
THE GREYHOUND CORPORATION, Defendants in Intervention

JUDGMENT—May 3, 1957

The motion of the defendants United States of America and Interstate Commerce Commission for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and the motion of the defendants in intervention Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation to dismiss the complaint herein pursuant to Rule 12(b) of the Federal Rules of Civil Procedure having come on for hearing before the special statutory three-judge District Court on February 23, 1956, and the motion of the plaintiffs for leave to amend their complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure having come on for hearing before the same Court on April 20, 1956, and briefs having been filed, argument of counsel having been heard, and the Court having given due consideration to the issues thereby pre-

sented, and having filed its opinion on April 12, 1957, setting forth its conclusions, and it appearing to the Court that the said motions for judgment on the pleadings and to dismiss the complaint should be granted and that the said petition for leave to amend the complaint should be denied;

[fol. 182] It Is Hereby Ordered, Adjudged and Decreed that the complaint herein be and it is hereby dismissed with prejudice; that the petition for leave to amend the complaint be denied; and that said defendants and defendants in intervention do have and recover their costs herein from the plaintiffs.

Dated: May 3, 1957.

/s/ William Healy, Judge.

/s/ Oliver J. Carter, Judge.

I concur in the foregoing, save and except as to the refusal of the Court to permit plaintiffs to amend their complaint (see Concurring and Dissenting Opinion heretofore filed):

/s/ George B. Harris, Judge.

Approved as to form, pursuant to Rule 21 of this Court:

County of Marin, et al., Plaintiffs, By /s/ Spurgeon Avakian, Their Attorney.

United States of America and Interstate Commerce Commission, Defendants, Lloyd H. Burke, By /s/ Wm. B. Spohn, Their Attorneys.

Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, Defendants in Intervention, By /s/ Allen P. Matthew, Their Attorney.

[File endorsement omitted]

[fol. 183] UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

NOTICE OF ENTRY OF JUDGMENT—May 3, 1957

To

Mr. Spurgeon Avakian, Attorney, Financial Center Building, Oakland 12, California.

United States Attorney, PO Building, San Francisco.

Mr. Robert W. Giannane, Attorney, Interstate Commerce Commission, Washington 25, D. C.

Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene, Attys., 1500 Balfour Building, San Francisco.

You Are Hereby Notified that on May 3, 1957 a Judgment was entered of record in this office in the above entitled case.

C. W. Calbreath, Clerk, U. S. District Court

San Francisco, California, May 3, 1957.

[fol. 184] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed May 29, 1957

1. Notice is hereby given that County of Marin, County of Contra Costa, Marin County Federation of Commuter Clubs, and Contra Costa County Commuters Association, the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the judgment and order, dated, filed, and entered in this action on May 3, 1957, dismissing the complaint and denying leave to amend the complaint. This appeal is taken pursuant to 28 U.S.C. Section 1253.

[fol. 185] 2. The Clerk will please prepare a transcript of the record in this cause, for transmittal to the Clerk of the Supreme Court of the United States, and include in said transcript the following: All the pleadings filed by the plaintiffs, the defendants, and the defendants in intervention, and the judgment and the opinion of the court, including the concurring and dissenting opinion of Judge Harris; the notice of entry of judgment; the complaint, together with Exhibits A to D appended thereto; the joint answer of the United States and the Interstate Commerce Commission; the motion by defendants in intervention for leave to intervene, and the order granting same; the order designating a 3-judge court; the motions for judgment on the pleadings and for dismissal; the motion for leave to amend the complaint, together with proposed amendment to complaint with Exhibit E attached; stipulation of dismissal with prejudice; affidavit of Gerald H. Trautman in opposition to motion for leave to amend complaint, dated March 9, 1956; dismissal with prejudice; and order of dismissal with prejudice.

3. The following questions are presented by this appeal:

a. The first question presented by this appeal is whether the exclusive and plenary power which Section 5 of the Interstate Commerce Act vests in the Interstate Commerce Commission with respect to consolidation and merger of carriers and carrier operations extends to a split-up of motor carrier operating rights under which an existing carrier proposes to transfer a portion of its operating rights to a newly created subsidiary which is not yet a carrier; or whether such a split-up falls under Section 212 (b) of the Act with respect to the interstate operating rights, and under the jurisdiction of the appropriate state commission with respect to the intrastate rights.

b. The second question presented by this appeal is [fol. 186] whether the court abused its discretion in denying plaintiffs' motion for leave to amend the complaint so as to challenge the sufficiency of the evidence on which the Interstate Commerce Commission based its decision; to challenge certain of the findings of the Interstate Commerce Commission as being contrary to the evidence or not based on any

evidence; and to charge the Interstate Commerce Commission with abuse of discretion in denying plaintiffs' petition for a rehearing.

Spurgeon Avakian, J. Richard Johnston, By Spurgeon Avakian, Attorneys for Appellants.

PROOF OF SERVICE (omitted in printing).

[fol. 187] IN UNITED STATES DISTRICT COURT

APPLICATION FOR ENLARGEMENT OF TIME FOR DOCKETING
CASE ON APPEAL—Filed June 26, 1957

The plaintiffs named above, through their attorney, apply to the Court for an order enlarging the time for docketing the case on appeal and filing the record thereof with the Clerk of the Supreme Court of the United States to and including September 2, 1957.

This application is made pursuant to Rule 13 of the Revised Rules of the Supreme Court of the United States and is based on the Affidavit of Spurgeon Avakian filed herewith and on the papers on file in this matter.

Respectfully submitted,

/s/ Spurgeon Avakian, Attorney for Plaintiffs and Appellants.

[File endorsement omitted]

[fol. 188] AFFIDAVIT OF SPURGEON AVAKIAN FOR
ENLARGEMENT OF TIME TO DOCKET CASE ON APPEAL

State of California,
County of Alameda, ss.

Spurgeon Avakian, being first duly sworn, deposes and says as follows:

I am the attorney for the plaintiffs named above, and, in that capacity on May 29, 1957, I filed with the Clerk of the above-entitled Court a Notice of Appeal to the Supreme

Court of the United States from the judgment and order of the above-entitled court entered in said matter on May 3, 1957.

Pursuant to Rule 13 of the Revised Rules of the Supreme Court of the United States, the above-entitled plaintiffs, as appellants, must docket the case and file the record thereof with the Clerk of the Supreme Court of the United States within sixty days after the filing of the Notice of Appeal, but any judge of the Court whose decision is being appealed may, for good cause shown, enlarge the time for docketing the case. The printed statement as to jurisdiction must be filed by counsel for the appellants upon the filing of the record with the Clerk of the Supreme Court of the United States.

Affiant has been advised by the office of the Clerk of the above-entitled Court that the preparation of the record on appeal in this matter will probably be completed sometime during the week of July 1, 1957. Affiant plans to leave for the Eastern part of the United States on July 2, 1957, and to return to California on August 5, 1957. The primary reason for affiant's trip is to attend the American Bar Association Convention in New York commencing July 9, 1957, and his attendance at that Convention is required by reason of the fact that he is a committee chairman in the Tax Section of the American Bar Association. In connection with this Convention, affiant has arranged to be accompanied by his family and to take a family vacation following the Convention. These plans were made more than six months ago, and affiant's plans with respect to the conduct of his law practice and the scheduling of vacations in his office have been arranged accordingly.

In view of the foregoing, affiant is submitting this affidavit in support of an application to enlarge the time for docketing the case on appeal in the above-entitled matter to and including September 2, 1957.

/s/ Spurgeon Avakian

Subscribed and sworn to before me this 26th day of June, 1957.

(seal) /s/ Miye Tabenchi(?), Notary Public in and for said County and State.

[File endorsement omitted]

[fol. 189] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR DOCKETING CASE AND
FILING RECORD—June 26, 1957

Based on the Affidavit of Spurgeon Avakian filed herewith and on application of counsel for plaintiffs, and good cause appearing,

It Is Hereby Ordered, pursuant to Rule 13 of the Revised Rules of the Supreme Court of the United States, that the time within which the plaintiffs named above may docket the case and file the record thereof with the Clerk of the Supreme Court of the United States be and it hereby is enlarged to and including September 2, 1957.

Dated this 26 day of June, 1957.

/s/ Oliver J. Carter, United States District Judge.

[File endorsement omitted]

[fol. 190] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

CROSS-DESIGNATION OF ADDITIONAL PORTIONS OF THE
RECORD—Filed August 19, 1957

Pursuant to Rule 12, paragraph 1, of the Revised Rules of the Supreme Court of the United States, the United States of America and the Interstate Commerce Commission, defendants in the above-entitled case, hereby designate the following portions of the record to be certified to the Supreme Court (in addition to the portions designated by the plaintiff-appellants):

1. Memorandum of the United States and the Interstate Commerce Commission in Opposition to Motion for Leave to Amend the Complaint;

2. Memorandum of Defendants in Intervention in Opposition to Motion for Leave to Amend Complaint.

Respectfully submitted,

Robert W. Ginnane, General Counsel, Interstate
Commerce Commission, Washington 25, D. C.,
Attorney for Interstate Commerce Commission.

Victor R. Hansen, Assistant Attorney General.

Lloyd H. Burke, United States Attorney.

James E. Kilday, John H. D. Wigger, Attorneys,
Department of Justice, Washington 25, D. C., At-
torneys for the United States of America.

[fol. 191] Clerk's Certificate to foregoing transcript omit-
ted in printing.

[fol. 192] SUPREME COURT OF THE UNITED STATES

No. 415—October Term, 1957

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY
FEDERATION OF COMMUTERS CLUBS, and CONTRA COSTA
COUNTY COMMUTERS ASSOCIATION, Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, GOLDEN GATE TRANSIT LINES, ET AL.

ORDER NOTING PROBABLE JURISDICTION—November 12, 1957

Appeal from the United States District Court for the
Northern District of California.

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable juris-
diction (sic) is noted.

November 12, 1957

AUG 30 1957

JOHN T. REY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA
COSTA, MARIN COUNTY FEDERATION
OF COMMUTERS CLUBS, and CONTRA
COSTA COUNTY COMMUTERS ASSOCIA-
TION,

Appellants,

VS.

UNITED STATES OF AMERICA, INTER-
STATE COMMERCE COMMISSION, GOLDEN
GATE TRANSIT LINES, PACIFIC GREY-
HOUND LINES, and THE GREYHOUND
CORPORATION,

Appellees.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Southern Division.

APPELLANTS' STATEMENT AS TO JURISDICTION.

SPURGEON AVAKIAN,

Financial Center Building,
Oakland 12, California,

Attorney for Appellants.

W. O. WEISSICH,

District Attorney of the County of Marin,
San Rafael, California,

FRANCIS W. COLLINS,

District Attorney of the County of Contra Costa,
Martinez, California,

Of Counsel.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No.

COUNTY OF MARIN, COUNTY OF CONTRA
COSTA, MARIN COUNTY FEDERATION
OF COMMUTERS CLUBS, and CONTRA
COSTA COUNTY COMMUTERS ASSOCIA-
TION,

Appellants,

VS.

UNITED STATES OF AMERICA, INTER-
STATE COMMERCE COMMISSION, GOLDEN
GATE TRANSIT LINES, PACIFIC GREY-
HOUND LINES, and THE GREYHOUND
CORPORATION,

Appellees.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Southern Division.

APPELLANTS' STATEMENT AS TO JURISDICTION.

A. OPINIONS OF THE COURT BELOW.

The decision of the Court below is reported at 150
F.Supp. 619. The judgment of the Court below (T.

181-2)¹ is set forth in Appendix A. The majority opinion (T.167-2), and the concurring and dissenting opinion (T.175-80), are appended hereto as Appendix B and Appendix C, respectively. The decision of the Interstate Commerce Commission (T.9-38) is appended as Appendix D.

B. GROUNDS ON WHICH JURISDICTION IS INVOKED.

This action was commenced in the Court below to set aside an order of the Interstate Commerce Commission which authorized Pacific Greyhound Lines, a common carrier of passenger, to transfer certain of its local bus operations in the San Francisco Bay area to its newly created subsidiary, Golden Gate Transit Lines, without the necessity of obtaining the approval of the Public Utilities Commission of the State of California, under whose jurisdiction the operations are conducted. The District Court had jurisdiction under Sections 2321-5, 2284, 1366, and 1398, of Title 28 of the United States Code, and pursuant thereto a three-judge Court was convened for the purpose of hearing the matter (T.77).

The judgment of the District Court sustaining the order of the Interstate Commerce Commission was dated and entered May 3, 1957 (T.181-3). The notice of appeal was filed with the Clerk of the District Court on May 29, 1957 (T.184-6). On June 27, 1957, the time for docketing the case and filing the record

¹Transcript references herein relate to the typewritten transcript of the clerk of the lower Court. There is no reporter's transcript.

thereof with the Clerk of this Court was enlarged to and including September 2, 1957 (T.189).

This Court has jurisdiction pursuant to Sections 1253 and 2101 of Title 28, and Section 45 of Title 49 of the United States Code.

C. QUESTIONS PRESENTED.

1. Whether the exclusive and plenary power which Section 5 of the Interstate Commerce Act vests in the Interstate Commerce Commission with respect to consolidation and merger of carriers and carrier operations extends to a split-up of motor carrier operating rights under which an existing carrier proposes to transfer a portion of its operating rights to a newly created subsidiary which is not yet a carrier; or whether such a split-up falls under Section 212(b) of the Act with respect to the interstate operating rights, and under the jurisdiction of the appropriate state commission with respect to the intrastate rights.
2. Whether the Court abused its discretion in denying appellant's motion for leave to amend the complaint so as to challenge the sufficiency of the evidence on which the Interstate Commerce Commission based its decision, to challenge certain of the findings of the Interstate Commerce Commission as being contrary to the evidence or not based on any evidence, and to charge the Interstate Commerce Commission with abuse of discretion in denying appellants' petition for a rehearing.

D. STATEMENT OF FACTS.

Appellees Pacific Greyhound Lines (hereinafter called Pacific Greyhound), Golden Gate Transit Lines (hereinafter called Golden Gate), and The Greyhound Corporation, filed applications with the Interstate Commerce Commission on February 8, 1954, seeking authority under Section 5 of the Interstate Commerce Act for the transfer to Golden Gate of certain passenger bus operations conducted by Pacific Greyhound in the San Francisco Bay area in exchange for the issuance to Pacific Greyhound of all of Golden Gate's outstanding capital stock. After the hearing officer had recommended denial of the applications, the Interstate Commerce Commission reviewed the matter and issued its order on July 6, 1955, granting the applications and authorizing the transfer. Appellants, who had appeared and participated in the Interstate Commerce Commission proceeding as protestants, filed a petition for rehearing on August 11, 1955, which petition was denied by the Commission on September 19, 1955.

A complaint to annul the order of the Interstate Commerce Commission was filed with the Court below on October 18, 1955. The joint answer of appellees United States of America and Interstate Commerce Commission was filed on December 15, 1955, and the motion of Pacific Greyhound, Golden Gate, and Greyhound Corporation for leave to intervene as defendants was made and granted on January 9, 1956. The latter three appellees made a motion to dismiss the complaint, and appellees United States of America

and Interstate Commerce Commission made a motion for judgment on the pleadings.

These motions were argued and submitted on February 23, 1956. At the time of said argument, a dismissal with prejudice (T.113) was entered as to various labor unions, representing Pacific Greyhound's drivers and other employees, who had protested the application and had joined as plaintiffs in the Court below. The dismissal order was based on a stipulation entered into by the unions and appellees (T.111-2).

Appellants asked permission, at the time of argument of said motions on February 23, 1956, to amend the complaint (T.171-2), and promptly filed a motion for leave to amend and a proposed amendment (T. 114-33).

The complaint as originally filed challenged the order of the Interstate Commerce Commission on the single ground that Section 5(2) of the Interstate Commerce Act (Section 5, Title 49, United States Code) has no application to a split-up of motor carrier operating rights, such as is involved in this proceeding.

The proposed amendment challenged various specified findings of the Interstate Commerce Commission as unsupported by the evidence, including the finding that the transfer of the local operations to Golden Gate would serve the public interest by separating labor negotiations involving intercity drivers from those relating to local drivers. In this connection the proposed amendment alleges (T.118) that on Febru-

ary 21, 1956, Pacific Greyhound and Golden Gate entered into labor agreements providing that, if the proposed transfer were consummated, the employees of both companies would be covered by the same employment contracts.

The proposed amendment also challenged the sufficiency of the evidence to support the following findings, or implied findings, of the Commission: that Golden Gate would be financially able to perform the operations; that the intrastate operations in question constitute a burden on the interstate operations of Pacific Greyhound; that the California Public Utilities Commission has determined Pacific Greyhound's fares in the light of its system-wide operations and revenues;² that the alleged managerial efficiencies could not be achieved as well by creating separate operating divisions as by creating a separate subsidiary corporation; and that the requirement that Pacific Greyhound make a cash investment of \$250,000.00 in Golden Gate (rather than \$150,000.00 as proposed in the application) would render Golden Gate financially able to perform the service.

The proposed amendment also alleged abuse of discretion on the part of the Interstate Commerce Com-

²On the contrary, the amendment alleges (T. 117-8) that the California Commission has limited its consideration to Pacific Greyhound's intrastate operations in California. This is clearly shown by that Commission's decisions, including Decision No. 55,226, recently issued by the California Commission on July 9, 1957, in Applications Nos. 38,017, *et al.*, and not yet reported, in which Pacific Greyhound was allowed a rate of return, on its total California intrastate operations, of 7.1%. See also *Re Pacific Greyhound Lines* (1951) 50 Cal. P.U.C. 650, where a rate of return of 6.4% was allowed.

mission in denying appellants' petition for rehearing and reconsideration.

The motion to amend was argued and submitted on April 20, 1956. On April 12, 1957, the lower Court filed a memorandum order, signed by two of the three judges, dismissing the complaint with prejudice and denying the motion to amend. A concurring and dissenting opinion was filed by the third judge, expressing the view that the amendment to the complaint should be permitted. A judgment in accordance with the majority view was entered on May 3, 1957.

The operations in question consist of local bus service in the San Francisco Bay area, consisting principally of service between San Francisco and adjacent residential areas to the north, east, and south within a radius of approximately thirty miles (T.12). A large portion of the passengers are commuters traveling between their places of work in San Francisco and their homes in Marin and Contra Costa Counties, and the Peninsula area to the south of San Francisco.

Of the total traffic involved, 94.3% is intrastate commerce and 5.7% consists of passengers utilizing the local service as a part of an interstate trip (T.33). The intrastate operations are conducted pursuant to certificates of public convenience and necessity issued by the Public Utilities Commission of the State of California, which has jurisdiction over the rates and service. Under the order of the Interstate Commerce Commission the intrastate certificates of public convenience and necessity would be transferred to Golden

Gate without the necessity of obtaining any approval from the California Public Utilities Commission.

The purpose of this transfer is obvious and has been conceded by appellees (T.29). It is to escape the regulatory principles applied by the California Public Utilities Commission, including the rule that in passing upon applications by a carrier for an increase in rates in a particular segment of its operations, the Commission will take into consideration the total earnings of the carrier from all of its intrastate operations in California, as well as to avoid certain obligations assumed by Pacific Greyhound when it undertook the Marin County operations, as outlined at length in the dissenting opinion (T.175-80; App.C, *infra*).

The transfer of operating rights as proposed in the application to the Interstate Commerce Commission contemplated that Pacific Greyhound would transfer to Golden Gate working capital of only \$150,000.00. The Interstate Commerce Commission found this amount inadequate and conditioned its approval of the transfer on the furnishing of \$250,000.00 as working capital (T.34). This was predicated on the finding that Golden Gate would incur a deficit of approximately \$150,000.00 during its first year of operation (T.34). In their petition for rehearing and reconsideration filed with the Interstate Commerce Commission, appellants requested an opportunity to present additional evidence to the effect that on July 28, 1955 (after the issuance of the Interstate Commerce Commission's decision), Pacific Greyhound had taken the position in testimony before the Public Utilities

Commission of the State of California that its working capital requirements for performing the services involved in this proceeding would be in excess of \$320,000.00. Attached to the petition was a verbatim transcript of the testimony to this effect given before the Public Utilities Commission of California by the same Pacific Greyhound executive who had testified before the Interstate Commerce Commission that working capital of \$150,000.00 would be sufficient.

The denial of this petition for rehearing was one of the grounds on which appellants sought to attack the order of the Interstate Commerce Commission in their motion to amend their complaint.

E. REASONS FOR CONSIDERATION BY SUPREME COURT.

1. The interpretation placed on Section 5(2) of the Interstate Commerce Act by the lower Court ousts the jurisdiction of state regulatory commissions over the transfer of wholly intrastate motor carrier operating rights issued by them. The plenary authority given to the Interstate Commerce Commission in Section 5 was never intended to embrace all transfers; rather, it was intended to apply only to transfers of operating rights in connection with the merger, consolidation, or unification of existing carriers—not to the split-up of an existing carrier into two or more subsidiaries, each of which obviously would possess only a portion of the economic resources of the mother unit.

This is the first case in which the Courts have been called upon to determine the applicability of Section 5(2) to split-ups of operations.

The language of Section 5(2)(a)(i) of the Interstate Commerce Act is clear and unmistakable. It authorizes the Commission to give approval to five classes of transfers, as follows (*italics added*):

- (1) "... for two or more *carriers* to consolidate or merge their properties or franchises into one corporation ...;

* * *

- (1) "... for any *carrier* ... to purchase, lease, or contract to operate the properties ... of *another*;

* * *

- (3) "... for any *carrier* ... to acquire control of *another* ...;

* * *

- (4) "... for a person which is *not a carrier* to acquire control of two or more *carriers* ...;

* * *

- (5) "... for a person which is *not a carrier* and which has control of one or more *carriers* to acquire control of another *carrier* ..."

In each of the first three instances, *all* the parties to the transaction must be *carriers*, and the transaction is either a merger of two or more *carriers* or the acquisition of one *carrier's* property or operations by *another*. It is conceded that Golden Gate is not yet a carrier—a conclusion which is compelled by the

definitions set forth in Sections 5(13) and 203(14). The proposed transfer, therefore, is not to a *carrier*, but only to an *expectant* or *would-be carrier*.

Only the fourth and fifth categories apply to non-carriers (which is Golden Gate's status), and then only if the non-carrier is to acquire control of another carrier or carriers. In this proceeding, the reverse situation exists, since the non-carrier (Golden Gate) is to be under the control of the carrier (Pacific Greyhound).

Thus, none of the provisions of Section 5(2) even remotely covers the split-up of a carrier's operations by transfer of a portion to a newly created corporation which is neither operating nor authorized to operate as a carrier.

That Congress was aware of this distinction is shown by Section 20a(1) of the Interstate Commerce Act, which provides (in connection with issuance of securities) that, as used in that section,

“... the term ‘carrier’ means a common carrier by railroad . . . or any corporation organized for the purpose of engaging in transportation by railroad . . .” (Italics added.)

There are good and sufficient reasons why Congress limited the extraordinary provisions of Section 5 to consolidations, mergers, and unifications. The legislative history of Section 5 shows that it was enacted (as part of the Transportation Act of 1940) to provide some means of relief to a very sick industry. The Senate Report points out that one-third of the railroad mileage in the country was already in bank-

ruptcy and another third was tottering on the verge. (S.R. 433, 76 Congress, First Session, May 16, 1939, p. 1.) Since 1920, the Interstate Commerce Act had required the Interstate Commerce Commission to take the initiative in proposing consolidation plans, but this approach "was not bearing fruit", and it had become apparent that

"waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements. The Transportation Act of 1940 relieved the Commission of formulating a nationwide plan of consolidations. Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of *merger or consolidation* if . . . the proposed transaction met with certain tests . . . in which case they should become effective regardless of state authority." (Italics added.)

Schwabacher v. United States (1948) 334 U.S. 182.

The various House and Senate Reports all refer to Section 5 as a vehicle for expediting consolidations, mergers, unifications, and pooling arrangements in order to prevent sick carriers from dying and to enable weak carriers to strengthen each other. So urgent was the need, and so desperate the economic plight of the carriers, that Congress provided, in Section 5(11), that a plan approved by the Interstate Commerce Commission could be put into effect without obtaining the approval which might otherwise be required from other federal agencies or from state agencies. See S.R. 433, *supra*; H.R. 1217, 76th Congress, First Session, July 18, 1939; H.R. 2016, 76th Congress, Third Session, April 26, 1940; H.R. 2832,

76th Congress, Third Session, August 7, 1940. See *St. Joe Paper Co. v. Atlantic Coast Line R. Co.* (1954). 347 U. S. 298, 315 (appendix), for a summary of the legislative history of Section 5.

This severe remedy was meant to enable weak carriers to gain strength by combining. Appellees would use it to permit a carrier to subdivide itself into smaller and separate units—the very antithesis of the purpose of Section 5.

If Congress had intended the extraordinary procedure of Section 5, with a complete by-passing of other federal agencies and state agencies, to apply to split-ups, it would most certainly have mentioned split-ups in the committee reports, if not in the statute itself. The reports use the terms “pooling”, “consolidations”, “mergers”, and “unifications”, but nowhere is there any reference, directly or indirectly, to a “split-up” or any similar term. And not only was the problem of a sick transportation industry considered at length by Congressional committees, but it had also been the subject of study by a special Committee of Six, consisting of three management and three labor representatives, appointed by the President in 1938. (See S.R. 433, 76th Congress, First Session, May 16, 1939.)

There is no basis for the suggestion in the opinion of the Court below that if Section 5 should be held inapplicable, Pacific Greyhound would be “free to make substantial alterations in its corporate structure, to create subsidiaries to take over part of its existing operation, or perhaps to venture into new areas, without the necessity of seeking Commission

approval" (T.171). The Interstate Commerce Commission would clearly have jurisdiction over the transfer of interstate operating rights under Section 212(b), which provides that "Except as provided in Section 5" interstate motor carrier operating rights may be transferred pursuant to rules and regulations prescribed by the Commission.

Section 5 clearly applies to the transfer of an operating right from an existing carrier to an existing carrier. If Section 5 also applies to the transfer of an operating right from a carrier to a non-carrier, on the theory announced in this case that upon consummation of the transaction the transferee would fall under Section 5, Section 212(b) would be completely meaningless. It is to be presumed that Congress had some area in mind for the applicability of Section 212(b), and that area exists only if Section 5 is limited to the consolidation and merger type of transactions.

Under well-established rules of statutory construction, Sections 5 and 212(b) should be construed in such a way as to give effect to both, and render neither "superfluous, void, or insignificant." And that cannot be done under the interpretation adopted by the lower Court.

Washington Market Co. v. Hoffman (1879) 101 U.S. 112; 116;

Ex Parte The Public National Bank of New York (1928) 78 U.S. 101, 104;

D. Ginsberg & Sons, Inc. v. Popkin (1932) 285 U.S. 204, 208.

It is to be noted that when Pacific Greyhound, Golden Gate, and the Greyhound Corporation filed

their application with the Commission, they prayed for authorization under Section 5 *or under Section 212(b)* if Section 5 were deemed inapplicable. Had the application been processed under Section 212(b) and transfer only of the interstate rights been authorized, we could not challenge the jurisdiction of the Commission; but in that event no transfer of the intrastate rights (which as a practical matter constitute almost the entire operation) could be made without first getting the approval of the state Public Utilities Commission.

The economic vice of the holding that Section 5 applies is that the state Public Utilities Commission, which has the direct regulatory responsibility for protecting the public interest with regard to substantially all of the operations involved, is completely bypassed, and the determination of public interest is made by a body (the Interstate Commerce Commission) which has regulatory responsibility for only a negligible portion of the operations. This anomalous result could be suffered if it were an inevitable by-product of the consolidation and merger rules which Congress deemed necessary when enacting Section 5. But the grant of plenary authority to the Interstate Commerce Commission goes only as far as the special measures which were authorized to strengthen weak carriers in a sick industry, and no further.

2. The denial by the lower Court of appellants' motion for leave to amend their complaint places an unduly restrictive limitation on the amendment of complaints contrary to the liberal rule embodied in Rule 15(a) of the Federal Rules of Procedure and in conflict with the decisions of other Courts.

The decision of the Court below states that an amendment which completely changes the theory of the case after the case has been submitted to the Court on another theory should not be permitted "without some showing of lack of knowledge, mistake or inadvertence on the part of the party seeking amendment, or some change of conditions of which that party had no knowledge or control" (T. 172).

The situation here is that the complaint initially raised only the legal question of the jurisdiction of the Interstate Commerce Commission, and that legal question was argued and submitted on a motion to dismiss and a motion for judgment on the pleadings. At the time of argument of that legal issue, counsel for appellants asked permission to amend his complaint to challenge the action of the Interstate Commerce Commission on the additional grounds (without abandonment of the jurisdictional question) that the findings of the Interstate Commerce Commission were not supported by the evidence in certain specified requests and that the Commission had abused its discretion in denying a petition for rehearing and reconsideration.

This motion and the proposed amendment were formally submitted in writing promptly thereafter, and the Court heard argument thereon some two months later, in April, 1956. Among the findings of the Commission which the amendment sought to challenge was the Commission's conclusion that the transfer of the local operations to Golden Gate would serve the public interest by separating the negotiation of employment contracts relating to the local drivers from those relating to the inter-city drivers, thereby minimizing the

possibility that a dispute with one group of drivers would result in a strike by the other group as well. The proposed amendment recited that on February 21, 1956 (two days prior to the argument of the motion to dismiss and the motion for judgment on the pleadings), Pacific Greyhound and Golden Gate had entered into an agreement with the various labor unions to the effect that if the proposed transaction were consummated the employees of Pacific Greyhound and Golden Gate would be covered by a single employment contract. Significantly enough, the labor unions who had originally been plaintiffs in this action stipulated to a dismissal with prejudice contemporaneously with the execution of this agreement (T. 111-3).

The only showing made by appellees in opposition to the motion to amend is contained in an affidavit by one of Pacific Greyhound's attorneys to the effect that prior to the filing of the complaint herein counsel for appellants informed him that he intended to raise only the question of the Commission's jurisdiction and did not intend to challenge the findings of the Commission (T. 164-6). There was no showing of any type of prejudice which might result to appellees from the raising of the additional grounds of attack on the Commission's order in February, 1956 (when the motion to amend was made), rather than in October, 1955 (when the original complaint was filed), nor does the opinion of the Court give any intimation of such prejudice.

Since the Court itself did not announce its ruling on the motion to amend until April, 1957, fourteen months after the motion was filed, the denial of the

motion can hardly be defended on the ground that the delay in final disposition of the matter would be prejudicial to appellees.

Appellants do not contend that the amendment should have been permitted in order to relieve them from inadvertence or neglect. On the contrary, they state that the limitation of the original complaint to the jurisdictional question was a considered decision made by their counsel and that the motion to amend was based on the conclusion of their counsel, after further consideration of the matter (particularly after the negotiation of a labor contract directly contrary to one of the Commission's public interest findings) that the Commission's action should be challenged on the additional grounds set forth in the proposed amendment.

Thus, appellants contend that a judgment decision of an attorney as to the legal theory on which the action should be conducted is a proper basis for amendment, and that in the absence of prejudice to the other parties, it is an abuse of discretion for the Court to refuse leave to amend.

Rule 15 of the Federal Rules of Civil Procedure sets forth a liberal policy of permitting amendments to pleadings, to the end that a controversy may be fully tried on all issues.

Subsection (a) reads in part as follows:

“(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed

upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires . . .*" (Emphasis supplied.)

Subsection (b) permits amendments to conform to the evidence, even after judgment.

Subsection (d) even authorizes supplemental pleadings to set forth transactions occurring since the date of the prior pleadings.

The application of Rule 15 by both trial and appellate Courts shows a uniform spirit of liberality in granting leave to amend. Even though the granting of such leave after a responsive pleading has been filed³ is a matter of judicial discretion, there have been numerous reversals on appeal where strong affirmative reasons for denying leave to amend are not shown.

Lloyd v. United Liquors Corp. (CA 6, 1953) 203 F.2d 789;

Doehler Metal Furniture Co. v. United States (CA 2, 1945) 149 F.2d 130;—

Maryland Casualty Co. v. Rickenbaker (CA 4, 1944) 146 F.2d 751;

Atlantic Coast Line R. Co. v. Mims (CA 5, 1952) 199 F.2d 582;

Rogers v. Girard Trust Co. (CA 6, 1947) 159 F.2d 239.

³It may be noted, parenthetically, that Pacific Greyhound, Golden Gate, and Greyhound Corporation never have filed a responsive pleading in this case, although the United States and the Interstate Commerce Commission have done so.

In a three-judge Court case involving review of an Interstate Commerce Commission order, the plaintiff was permitted to amend his complaint on the day of the trial to set forth a completely new ground. See *L. A. Tucker Truck Lines, Inc. v. United States* (E.D. Mo. 1951) 100 F.Supp. 432, 434, where the Court said:

"Amendments to pleadings are largely discretionary with the courts and the courts have repeatedly held that amendments to pleadings should be allowed with great liberality at any stage of the proceedings unless violative of settled law or prejudicial to rights of opposing parties. The courts have been very liberal in permitting amendments where it is necessary to bring about a furtherance of justice."

The timeliness of the application is significant only on the question of whether the opposing parties will be substantially prejudiced. Delay of itself is not ground for reversal, nor is there any requirement of diligence or excusable neglect (as there would be in a motion to set aside a judgment).

Armstrong Cork Co. v. Patterson-Sargent Co.
(D.C. Ohio, 1950) 10 F.R.D. 534;

Markert v. Swift & Co., Inc. (CA 2, 1949) 173
F.2d 517;

Maryland Casualty Co. v. Rickenbaker (CA 4,
1944) 146 F.2d 751.

See also:

McDowall v. Orr Felt & Blanket Co. (CA 6,
1944) 146 F.2d 136.

We can perceive no substantial prejudice to any of the appellees from permitting appellants to raise their

additional grounds of attack on the Interstate Commerce Commission order in February, 1956, as distinguished from having raised them in the original complaint filed in October, 1955. The case was not yet fully at issue, since the Defendants in Intervention had not filed their answer. Indeed, Defendants in Intervention did not even make their motion to intervene until January 9, 1956, almost three months after the action was filed, and only six weeks before leave to amend was sought.

The proposed amendment to the complaint raises substantial questions going to the merits and validity of the order under review. The case is one of considerable public importance and should not be disposed of without consideration of these matters. As the dissenting opinion concludes, the amendment should be permitted in the interests of justice, and consideration should be given to a remand to the Interstate Commerce Commission for further proceedings (T. 180).

Dated, August 21, 1957.

Respectfully submitted,

SPURGEON AVAKIAN,

Attorney for Appellants.

W. O. WEISSICH,

District Attorney of the County of Marin,

FRANCIS W. COLLINS,

District Attorney of the County of Contra Costa,

Of Counsel.

(Appendices A, B, C and D Follow.)

Appendix A

Lloyd H. Burke,

United States Attorney,

William B. Spohn,

Assistant United States Attorney,

Attorneys for the Defendants

United States of America and

Interstate Commerce Commission.

*In the United States District Court for the
Northern District of California,
Southern Division*

Civil Action No. 34,985

County of Marin, et al.,

Plaintiffs,

vs.

United States of America and Inter-
state Commerce Commission,

Defendants.

Golden Gate Transit Lines, Pacific
Greyhound Lines, and The Grey-
hound Corporation,

Defendants in Intervention.

JUDGMENT

The motion of the defendants United States of
America and Interstate Commerce Commission for

judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and the motion of the defendants in intervention Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation to dismiss the complaint herein pursuant to Rule 12(b) of the Federal Rules of Civil Procedure having come on for hearing before the special statutory three-judge District Court on February 23, 1956, and the motion of the plaintiffs for leave to amend their complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure having come on for hearing before the same Court on April 20, 1956, and briefs having been filed, argument of counsel having been heard, and the Court having given due consideration to the issues thereby presented, and having filed its opinion on April 12, 1957, setting forth its conclusions, and it appearing to the Court that the said motions for judgment on the pleadings and to dismiss the complaint should be granted and that the said petition for leave to amend the complaint should be denied;

It is hereby ordered, adjudged, and decreed that the complaint herein be and it is hereby dismissed with prejudice; that the petition for leave to amend the complaint be denied; and that said defendants and defendants in intervention do have and recover their costs herein from the plaintiffs.

Dated: May 3, 1957.

/s/ William Healy,
Judge,

/s/ Oliver J. Carter,
Judge.

I concur in the foregoing, save and except as to the refusal of the Court to permit plaintiffs to amend their complaint (see Concurring and Dissenting Opinion heretofore filed):

/s/ George B. Harris,
Judge.

Approvals as to form attached.

Appendix B

Original Filed Apr. 12, 1957.
Clerk, U. S. Dist. Court,
San Francisco.

*In the United States District Court for the
Northern District of California,
Southern Division*

Civil Action No. 34,985

County of Marin, et al.,

Plaintiffs,

vs.

United States of America and Inter-
state Commerce Commission,

Defendants.

Golden Gate Transit Lines, Pacific
Greyhound Lines, and The Grey-
hound Corporation,

Defendants in Intervention.

OPINION

Before Healy, Circuit Judge, and Harris and Carter,
District Judges.

Carter, District Judge.

This action has been brought to restrain the en-
forcement of, and to set aside an order of the Inter-

state Commerce Commission which approved and authorized a plan of the Pacific Greyhound Lines to transfer its San Francisco commuter operation to its new subsidiary, the Golden Gate Transit Lines hereinafter referred to as "Pacific" and "Golden Gate", respectively. Jurisdiction of this Court is sought under 28 U.S.C. 2325 and 28 U.S.C. 2284. The complaint attacks the authority of the Commission to make the order of approval, and has been brought by the counties of Marin, Contra Costa, each of which lies across the bay from San Francisco, and two commuter associations. Named as defendants are the United States and the Interstate Commerce Commission, and these parties, after answering, moved for a judgment on the pleadings. Golden Gate, Pacific, and the parent of Pacific, the Greyhound Corporation, all joining as defendants in intervention, have moved to dismiss the complaint for failure to state a claim.

Each of these motions raise the same question, whether the Commission was correct in ruling that section 5(2)(a) of the Interstate Commerce Act, 49 U.S.C.A. §5(2)(a), gave jurisdiction to approve the proposed transaction. That section requires approval of the Commission:

"... for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any

carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;". (Emphasis added.)

It is the meaning of the italicized portion of the section which is in dispute here. The proposal is to transfer the properties and operating rights used to serve the San Francisco Bay Area commuter service, to Golden Gate, and Pacific would concurrently *acquire control* of Golden Gate by taking back all of its capital stock. By the same transaction, Greyhound Corporation, through its ownership of Pacific, would also *acquire control* of Golden Gate. The plaintiffs claim that this does not come within the italicized portion of Section 5(2)(a) because the section was only intended to cover cases where a carrier or carriers seek to acquire control of another *existing* carrier, and that Golden Gate will not acquire a carrier status until the operating rights of Pacific have actually been transferred to it.

~We have no difficulty in finding that the proposed transaction is covered by the language of the section; it merely says that approval of the Commission is required when one carrier acquires control of another. That is precisely what the Greyhound Corporation and Pacific are seeking to do here; although Golden

Gate will not attain the status of a carrier until the operating rights of Pacific are transferred to it, neither will the parent corporations acquire control until then, for the properties and operating rights are to be simultaneously exchanged for the stock.

The real thrust in the plaintiffs' argument that the section does not cover the proposed transaction lies in their contention of legislative purpose in enacting this legislation. It is argued that in enacting Section 5 Congress only intended to cover consolidations, unifications, and mergers of carrier control; that there was no intention to cover the case of an existing carrier splitting up its operations, which Pacific seeks to do here. This version of the Congressional intention is buttressed by excerpts showing that Congress, in enacting Section 5, as part of the Transportation Act of 1940, 54 Stat. 905, was endeavoring to inject economic strength into failing carriers, by permitting them to combine and consolidate, providing their plans met with certain other tests.

We assume that the dominant purpose of Section 5(2) was to reach cases in which carriers sought to unite their control. But we think the plaintiffs' version of Congressional purpose underlying Section 5 is too narrow, and that it ignores the whole regulatory scheme of the Interstate Commerce Act. Section 5(2)(a) was not newly conceived in the Transportation Act of 1940. We find that Section 5 of the Transportation Act of 1920, 41 Stat. 456, contained provisions substantially like those found in the present statute. While the 1920 Act applied only to railroad car-

riers, Congress had already determined the necessity of subjecting transactions affecting carrier control to the scrutiny of the Interstate Commerce Commission. In 1948, the Supreme Court reiterated the purpose of the 1920 Act in *Schorabacher v. United States*, 334 U.S. at 182, where it said:

"In a series of decisions on particular problems, this Court defined the general purposes of that Act to be the establishment of a new federal railway policy to insure adequate transportation service by means of securing a fair return on capital devoted to the service, restoration of impaired railroad credit, and regulation of rates, security issues, consolidations and mergers in the interest of the public. The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, *to control rate and capital structures, physical make-up and relations between carriers*, in the light of the public interest in an efficient national transportation system. (Citing cases)." (Emphasis added).

So far as it was the purpose of Congress to have the Interstate Commerce Commission control the capital structure, physical make-up and relations between carriers under the power conferred by Section 5, we are unable to read out of the statute the transaction at hand.

We also find support for upholding the jurisdiction of the Commission here in *New York Central Securities Co. v. U.S.*, 287 U.S. 12, (1932). The question was whether Section 5(2) then applying only to

railroad carriers (41 Stat. 456) and requiring Commission approval when one carrier acquired control of another "either under a lease or by the purchase of stock" reached a transaction where a parent corporation leased the properties of its subsidiary. The Supreme Court held that the leasing constituted an acquisition of control within the language of the Act, over the argument that the parent already controlled the carrier's properties through its ownership of the stock of the subsidiary. There was no new control acquired that did not exist before in a different degree, but merely a change in the form of the control. The proposal in the instant case is to change the degree or form of control over the properties of the carrier, by transferring them to the subsidiary Golden Gate, and we think that the above holding requires that it be approved by the Commission under the present Section 5(2).

We find no cases construing the pertinent language of Section 5(2)(a) since it was expanded to include motor carriers, but there are judicial decisions construing comparable provisions in the Civil Aeronautics Act. Section 408 of that Act (49 U.S.C.A. 488) provides that:

"(a) It shall be unlawful, unless approved by order of the Board as provided in this section . . . (5) for any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;"

In *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F.2d 810 (CCA 2, 1941), American Export Airlines Inc., organized as a subsidiary to American Export Lines, Inc., a common carrier by water, applied to the Civil Aeronautics Board for a certificate permitting it to do business as an air carrier, and in addition, approval of control of it by its parent American Export Lines, under the above section. The Board dismissed the application for approval of control, on the same theory which plaintiffs invoke here, viz., the control provision did not reach a transaction unless the air carrier sought to be controlled was already an air carrier. Judge Hand rejected this interpretation, reversed the dismissal, and remanded the case to the Board, stating:

"This seems to us an unduly literal interpretation of subdivision (5). In our opinion 'to acquire control of any air carrier in any manner whatsoever' is to take all steps involved in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources, with a certificate authorizing operation. Any other interpretation would enable a steamship company, by organizing a subsidiary for air carriage, to escape the requirement of Section 408(b) that the 'Authority shall not enter . . . an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition'".

The reasoning of Judge Hand is equally applicable here. Section 5(2) subdivision (c) of the Interstate Commerce Act supplements Section 5(2)(a) in stating:

“In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; . . . (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.”

If Greyhound is free to make substantial alterations in its corporate structure, to create subsidiaries to take over part of its existing operation, or perhaps to venture into new areas, without the necessity of seeking Commission approval, the function of that body to assure adequate transportation service to the public is unduly restricted.

Finally we note that the Interstate Commerce Commission itself has, on other occasions, ruled that the type of transaction which Pacific Greyhound proposes is a Section 5 transaction. See: *Columbia Motor Service Co.—Purchase—Columbia Terminals Co.*, 35 M.C.C. 531, and *Consolidated Freightways, Inc.—Control—Consolidated Convoy Co.*, 36 M.C.C. 351, which were decided shortly after Section 5(2) was enacted into its present form. In each of these cases motor carriers sought and obtained Commission ap-

proval to transfer a part of their operation to a newly created corporation, whose carrier status had to await the completion of the transaction. See also: *Takin—Purchase—Takin Bros. Freight Line, Inc.*, 37 M.C.C. 626, and *Gelhous & Holobinko—Control*, 60 M.C.C. 167. The Supreme Court has made itself clear regarding the weight to be given to Commission interpretations of the Interstate Commerce Act. In *United States v. American Trucking Associations*, 310 U.S. 534 (1940) at 549 it said:

“In any case such interpretations are entitled to great weight. This is peculiarly true where the interpretations involve contemporaneous construction of a statute by the man charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.”

We therefore hold that the Commission was correct in holding that it had jurisdiction to approve the transaction in question, and both motions should be granted.

There remains one further issue to be decided. During the final arguments on the motions to dismiss and for judgment on the pleadings, plaintiffs, County of Marin, County of Contra Costa, Marin County Federation of Commuters Clubs, and Contra Costa Commuters Association, asked for permission to amend the complaint. After the motions had been submitted these plaintiffs formally moved the Court for permission to amend the complaint by adding allegations challenging the findings of the Commission that the transaction be-

tween Pacific and Golden Gate was consistent with the public interest, and that the Commission abused its discretion in denying plaintiff's petition for rehearing and reconsideration. The effect of the motion to amend is to inject into the case the completely new issue of the sufficiency of the evidence to support the findings of the Commission. The complaint, as originally framed, raised only the issue of jurisdiction, and the motions to dismiss and for judgment on the pleadings were argued and submitted only on that issue. Plaintiffs concede that the proposed amendment attempts to raise issues known to them at the time of the filing of the complaint and at the time of the hearings on the motions. They argue, however, that under the liberal provisions of Rule 15(a) of the Federal Rules of Civil Procedure the amendments should be permitted.

The motion for leave to amend is addressed to the sound discretion of the Court, and must be decided upon the facts and circumstances of each particular case. It would serve no useful purpose to review the many cases dealing with Rule 15. It is sufficient to say that the power of the Court to permit amendment should not be used to completely change the theory of the case after the case has been submitted to the Court on another theory without some showing of lack of knowledge, mistake or inadvertence on the part of the party seeking amendment, or some change of conditions of which that party had no knowledge or control. Plaintiffs have made no such showing here. The motion to amend is denied.

Counsel for defendants and defendants in intervention are directed to prepare and present orders in conformity herewith.

Dated: April 12th, 1957.

William Healy,
Circuit Judge.
Oliver J. Carter,
District Judge.

I concur in the majority opinion upholding the jurisdiction of the Commission. I dissent in the refusal of the Court to grant plaintiffs permission to amend the complaint regarding the issue of the sufficiency of the evidence.

A memorandum of my views to follow hereafter.

Dated: April 12, 1957.

/s/ George B. Harris,
District Judge.

Appendix C

Original Filed Apr. 17, 1957.

Clerk, U. S. Dist. Court,

San Francisco.

*In the United States District Court for the
Northern District of California,
Southern Division*

Civil Action No. 34,985

County of Marin, County of Contra
Costa, Marin County Federation
of Commuter Clubs, Contra Costa
County Commuters Association, and
Amalgamated Association of Street,
Electric Railway and Motor Coach
Employees of America, Divisions
1055, 1222, 1223, 1225 and 1471,
Plaintiffs,

vs.

United States of America and Inter-
state Commerce Commission,
Defendants,

Golden Gate Transit Lines, Pacific
Greyhound Lines, and The Grey-
hound Corporation,
Defendants in Intervention.

CONCURRING AND DISSENTING OPINION OF JUDGE HARRIS

* * * * *

Dated: April 17, 1957.

George B. Harris,
United States District Judge

Judge Harris, concurring in part and dissenting in part:

(Defendants in intervention Golden Gate Transit Lines and Pacific Greyhound Lines shall be herein-after referred to as "Golden Gate" and "Pacific" respectively, as in the majority opinion.)

I concur in the majority opinion upholding the jurisdiction of the Commission. I dissent in the refusal of the Court to grant plaintiffs permission to amend the complaint regarding the issue of the sufficiency of the evidence.

The motion to amend the complaint and the proposed amendment itself must be considered in the light of the historical events and proceedings conducted by the defendant in intervention, Pacific, before the California Public Utilities Commission (formerly the Railroad Commission of California).

The granting or refusing to grant leave to amend cannot be viewed in a judicial vacuum, nor can the determination and the exercise of a sound discretion be reached without a regard for the realities, and the background and motives which inspired Pacific to invoke the procedural technique thereafter adverted to.

Particularly is this so by reason of the admission made by Pacific that it invoked the procedure under Section 5(2)(a) of Title 49 U.S.C.A., before the Interstate Commerce Commission, creating Golden Gate, in order to circumvent the rate-making authority and jurisdiction of the California Public Utilities Commission. In short, the foregoing section was availed

of as a legal device to avoid not only the proceedings and decisions which will be reviewed immediately hereafter, but as well, the express agreement made by Pacific, which in turn inured or should inure to the benefit of residents and commuters of the bay area communities involved in this litigation.

Judicial notice may be had of the fact that Pacific has appeared before the California Public Utilities Commission on numerous occasions in connection with its operations in Marin and Sonoma Counties.¹ In 1939 it made its application to replace Northwestern Pacific Railroad which was then serving commuters by means of rail and ferryboat service. When many North Bay residents protested at the proposed change, Pacific assured the California Railroad Commission that it would assume the exclusive transportation service on a minimum financial recovery basis. (42 Opinions and Orders of the Railroad Commission of California 661.) At page 668 the following language appears in the opinion of the Commission:

"The record, as it now stands, shows conclusively that the Greyhound is the only carrier which is able financially and otherwise to provide Marin County with a service to take the place of that to be abandoned. It has made a firm offer to substitute its proposed service for that of the Northwestern Pacific in event it is granted authority to serve the entire territory to be abandoned by the rail carrier.

The record shows that the Pacific Greyhound Lines made its proposal not with the thought that

¹42 Ry. Comm. 372 and 661; 50 PUC 650; 53 PUC 624, etc.

it would return the full cost of operation, but that it would realize something over and above the out-of-pocket cost of operation. The inference may be fairly drawn that the decision to embark upon this undertaking was made with some hesitation and only after a long and complete study of its feasibility. It may be that the Pacific Greyhound Lines was influenced to some extent by the fact that if its application were granted and the Northwestern Pacific Railroad authorized to abandon service, the Northwestern Pacific Railroad, a wholly owned subsidiary of the Southern Pacific Company, (4) would be relieved of a substantial continuing out-of-pocket loss. [(4) The Southern Pacific Company owns approximately 39% of the common stock of the Pacific Greyhound Lines.]

Whatever may have been the underlying reasons which influenced the Greyhound to make this offer is relatively unimportant, as the record leaves no doubt that it was made in good faith and with the avowed purpose of providing Marin County with a satisfactory, adequate, and enduring transportation service. These underlying reasons only become important in evaluating the statement of the Greyhound, heretofore quoted, to the effect that a denial of the right to serve Mill Valley would necessitate a withdrawal of its offer and a resurvey of the entire proposal."

The order of the Commission based upon its pleadings and opinion concluded as a condition for the granting of a certificate of public convenience and necessity that:

"(4) The rights and privileges herein authorized may not be discontinued, sold, leased, transferred,

nor assigned unless the written consent of the Railroad Commission to such discontinuance, sale, lease, transfer, or assignment has first been obtained."

At a recent hearing,² Pacific admitted that it had agreed to operate without hope of financial reward except the realization of sufficient returns to cover the actual out-of-pocket costs of the North Bay venture.

The foregoing review is significant by reason of the recent Supreme Court decision in *Pacific Gas and Electric Co. v. Sierra Pacific Power Co.*, 350 U.S. 348, decided shortly after the instant ruling of the Interstate Commerce Commission.

In setting aside an order of the Commission and remanding the Pacific Gas and Electric Company case, the Supreme Court held that a public utility may not be relieved of an improvident bargain even though such bargain produces less than a fair rate of return on its investment. The Commission's duty is to protect the *public interest* as distinguished from the "*private interests of the utilities.*" A contract is neither unjust nor unreasonable merely because it is unprofitable to the utility. The express agreement of Pacific with the California Railroad Commission dated May 21, 1940, provident or improvident, cannot be ignored.

By parity of reasoning, when the ICC reviews local operations of Pacific it must consider its financial returns in terms of the public interest. Even though income realized from a specific sector is less than a

²Vol. 53 California Public Utility Commission Reports 634.

fair rate of return, Pacific is not entitled to relief in the absence of proof of losses (not offset by intrastate revenue), which place a burden on interstate commerce.

Plaintiffs in their proposed amendment to the complaint have sought to point out the frailties in Golden Gate, as well as the avoidance on the part of Pacific of the agreement made in the vital proceedings before the California Public Utilities Commission—vital in the sense that the proceedings sought to and did protect the public interest as distinguished from the “private interest of the utilities.” (Cf. *Pacific Gas and Electric Co. v. Sierra Pacific Power Co.*, *supra*.)

The proposed amendment sets forth and challenges the findings of the ICC as to the financial ability of Golden Gate to operate. They charge that their limited capital structure—contributed by Pacific—and the narrow scope of their operations preclude economic success. The amendment also challenges numerous findings pertaining to Golden Gate as a carrier, contending that there is no substantial evidence to show that the local operations will support this carrier. If, in fact, such operations now earn a fair return for Pacific, the latter had no basis for complaining about the intrastate drain on its interstate business and the supposed burden placed upon interstate passengers.

Plaintiffs’ allegations establish the necessity for a complete hearing and review before this Court.³ This is especially so in view of the fact that Pacific has

³Cf. *Breswick & Co. v. United States*, 138 F.Supp. 123, 137, 138.

undertaken to avoid the consequences of its agreement with the California Public Utilities Commission (see especially pp. 672, 673 of 42 Ry. Comm. of California), by disposing of its local operations to an independent, but wholly owned subsidiary without first obtaining written consent from the California Commission, which is opposed to the transfer.

Under all of the circumstances⁴ and in the exercise of a sound and liberal discretion (Rule 15(a) FRCP), plaintiffs' motion to amend should be granted, since "justice so requires."⁵

As a matter of alternative relief, consistent with the Supreme Court decision in *Pacific Gas and Electric Co. v. Sierra Pacific Power Co.*,^{supra}, consideration should be given to a remand of said cause to the Interstate Commerce Commission for further proceedings.⁶

⁴It should be observed that no defendant will suffer any substantial prejudice by permitting plaintiffs to amend their complaint. The California Public Utilities Commission granted Pacific a rate increase on its local operations shortly after this matter was argued and submitted to the court.

⁵*Armstrong Cork Co. v. Patterson-Sargent Co.*, 10 FRD 534; *McDowall v. Orr Felt & Blanket Co.*, 146 F.2d 136; *Maryland Casualty Co. v. Rickenbaker*, 146 F.2d 751; *Lloyd v. United Liquors Corp.*, 203 F.2d 789; and *L. A. Tucker Truck Lines, Inc. v. United States*, 100 F.Supp. 432.

⁶*Cf. United States v. Ohio Power Co.* (Supreme Court) decided April 1, 1957, No. 312, Oct. Term, 1955.

Inland Freight Corp. v. United States, 60 F.Supp. 520 (9th Cir.); *Clarke v. U. S.*, 101 F.Supp. 587; *Carolina Freight Corp. v. United States*, 38 F.Supp. 549.

Appendix D

Served
July 15 1955

Interstate Commerce Commission

No. MC-F-5643¹

The Greyhound Corporation—Control; Pacific Greyhound Lines—Control; Golden Gate Transit Lines—Purchase (Portion)—Pacific Greyhound Lines.

Submitted March 16, 1955

Decided July 6, 1955

1. Application of Pacific Greyhound Lines for authority to acquire control of Golden Gate Transit Lines through ownership of capital stock and for the contemporaneous acquisition by Golden Gate Transit Lines of certain operating rights and property of Pacific; and of The Greyhound Corporation to acquire control of Golden Gate Transit Lines through stock ownership, and of the operating rights and property through the transaction, approved and authorized, subject to conditions.
2. Application by Pacific Greyhound Lines for a certificate of public convenience and necessity authorizing continuance of operations by it in interstate or foreign commerce between certain points in California, granted.

Allen P. Matthew and Gerald H. Trautman for applicants.

Spurgcon Arakian and Jack Robertson for protestants.

¹This report embraces No. MC-1511 (Sub-No. 103), Pacific Greyhound Lines, San Francisco, Calif.

REPORT OF THE COMMISSION

By the Commission:

Exceptions were filed by applicants and by the protesting labor union to the examiners proposed report which recommended denial of the applications, and a reply to applicants' exceptions was filed collectively by the other protestants. Pursuant to applicants' request, oral argument was heard on March 16, 1955, in which applicants and all protestants participated. Our conclusions differ from those of the examiner.

By joint applications filed February 8, 1954, as amended, Pacific Greyhound Lines and Golden Gate Transit Lines, both of San Francisco Calif., herein called Pacific and Golden Gate, respectively, seek authority under section 5 of the Interstate Commerce Act (1) for Pacific to acquire control of Golden Gate through ownership of all its outstanding capital stock, and (2) for the contemporaneous acquisition by Golden Gate of certain operating rights and property of Pacific. The Greyhound Corporation of Chicago, Ill., herein called Greyhound, which controls Pacific through ownership of a majority of its outstanding common capital stock² has joined in the application

²See the report in Finance Docket No. 18382, *The Greyhound Corporation Securities*, I.C.C., decided April 22, 1954, for a discussion of certain financing plans in furtherance of Greyhound's long-range program to integrate into its organization 8 of its bus operating subsidiaries, including Pacific, and also 2 companies in which Greyhound owns no stock. In the pending application in No. MC-F-573, *The Greyhound Corporation—Merger—Pacific Greyhound Lines; Control—California Parlor Car Tours Co.*, the merger of Pacific into Greyhound is proposed. That application reflects ownership by Greyhound as of November 12, 1954, of 97.8 percent of the outstanding common stock and 63.9 percent of the outstanding preferred stock of Pacific.

and seeks authority to acquire concurrent control of Golden Gate and of the operating rights and properties through the transaction. In a separate application, as a matter directly related to the applications under section 5, Pacific, in No. MC-1511 (Sub-No. 103), as amended, seeks a certificate of public convenience and necessity authorizing continuance of operations by it in interstate or foreign commerce between certain points in California, over portions of the routes over which Golden Gate would operate as a result of the purchase. The joint board having waived participation in No. MC-1511 (Sub-No. 103), a consolidated hearing was held before the examiner, at which Divisions 1055, 1222, 1223, 1224, and 1471, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, herein called the Union, the counties of Marin and Contra Costa in California, herein collectively called the Counties, the Federation of Marin County Commuter Clubs, and the Contra Costa County Commuters Association, the last two herein collectively called the Commuter Associations, opposed the applications. Greyhound and Pacific operate substantially more than 20 motor vehicles.

Greyhound, a Delaware corporation, is the parent company of the nationwide system of motor bus transportation. It operates in interstate or foreign commerce as a motor common carrier of passengers over regular routes through the medium of autonomous operating divisions, which form integrated operating units within the company, and it controls a number of separate operating subsidiary corporations. It also controls several terminal, garage, and other noncarrier

companies, Greyhound's outstanding capital stock is widely distributed, the 10 principal stockholders owning and holding for the benefit of others, in the aggregate, 9.49 percent of the common voting stock as of March 2, 1953, the largest block of which constitutes 3.53 percent.

Pacific³ operates as a motor common carrier of passengers between points in California, Oregon, Nevada, Utah, Texas, Arizona, and New Mexico.⁴ It conducts intercity operations over routes between Astoria, Oreg., and San Diego, Calif.; between San Francisco and Salt Lake City, Utah; between Los Angeles and Albuquerque, N. Mex.; and between Los Angeles and El Paso, Tex. In combination with other members of the Greyhound system and with other bus lines, Pacific has been providing joint-through service between San Francisco, on the one hand, and, on the other, Seattle, Spokane, Chicago, St. Louis, and Boise; and between Los Angeles, on the one hand, and, on the other, Seattle, Chicago, San Diego, Memphis and New Orleans.

Pacific conducts extensive intrastate operations in California, and provides commutation or "mass transportation" service in and around the San Francisco Bay area under certificates issued by the California

³Pacific holds 100 percent of the stock of California Parlor Car Tours Company, which conducts a touring service between San Francisco and certain points in California, Reno, Nev., and Grants Pass, Oreg.

⁴Its interstate operations are conducted pursuant to certificates issued in No. MC 1511 and subnumbered proceedings. Pacific has pending, in No. MC 1511 (Sub-No. 102), an application for a certificate consolidating and superseding all of its presently outstanding separate certificates.

Commission, over routes embraced also in certificates issued by this Commission covering its interstate operations. These commuter operations cover distances up to 25 or 30 miles, radiating from San Francisco to the suburban area, north into Marin County, south on the Peninsula, and east into Contra Costa County. More specifically, the Marin County service includes Stinson Beach, Sausalito, Marin City, Mill Valley, Corte Madera, Larkspur, San Rafael, Ross, San Anselmo, Fairfax, Hamilton Field, Inverness, Bolinas, and Novato; the Contra Costa operation extends from San Francisco and Oakland and includes Berkeley, Martinez, Port Chicago, Orinda Corners, Lafayette, Walnut Creek, Concord, Camp Stoneman, Crystal Pool, Monument, Pittsburg, Antioch, Danville, and Dublin; and the Peninsula and Half Moon Bay operations include South San Francisco, San Francisco Airport, San Bruno, Millbrae, Burlingame, Belmont, San Carlos, San Mateo, Redwood City, Menlo Park, Bellehayen, Palo Alto, Sharp Park, Rockaway Beach, Montara, El Granada, and Half Moon Bay. The local operations represent 3.08 percent of Pacific's total route miles, account for 7.44 percent of its bus miles operated, and produce 9.16 percent of its gross passenger revenue; but they account for 35.49 percent of the total number of passengers transported by Pacific. Marin County has a population of about 100,000, the area served in Contra Costa County, 60,000,⁵ and the Peninsula, 250,000.

⁵The Rand McNally Road Atlas shows the population of Contra Costa County for 1950 as 298,984.

Golden Gate, which was incorporated on May 7, 1953, has engaged in no business activities and is not now a motor carrier. Pursuant to an agreement entered into on January 27, 1954, and a supplemental agreement of April 8, 1954, between Pacific and Golden Gate, the latter would acquire from the former, with the exception of authority over an alternate route between Danville and Dublin, over California Highway 21, which applicants request be canceled, the above-described interstate and intrastate operating rights of Pacific in the San Francisco Bay area, including intrastate authority within the cities of San Francisco, Oakland, Pittsburg, and Berkeley essential for operations in connection with the routes purchased. The interstate operating rights to be acquired are specifically set forth in Appendix A hereto, and our findings will be conditioned to cancel the operating rights over the alternate route mentioned. Golden Gate would also receive from Pacific \$150,000 in cash, 52 buses recently purchased by Pacific under conditional sales contracts, 138 transit-type buses, and fare boxes used in the operations, and it would acquire Pacific's rights and assume its obligations in certain leaseholds and other contracts pertaining to the commuter operations. In payment therefor, Golden Gate would issue to Pacific all of its capital stock, consisting of 300,000 shares of \$1 par value common, assume the outstanding indebtedness on the 52 buses, and it would be obligated to pay to Pacific the difference between such indebtedness and the net book value of the buses at the date of consummation. The amount of the differ-

ence would be carried by Golden Gate as an open account indebtedness to be repaid to Pacific as it is able to do so.

Principally in order to continue utilizing the routes in its long-haul interstate service, over which Golden Gate would render the commuter service as a result of this transaction, Pacific requests, in No. MC-1511 (Sub-No. 103), that a certificate be issued to it authorizing the transportation of passengers and their baggage, and express, mail, and newspapers, in the same vehicle with passengers, in the Marin County area between Novato and San Francisco; in the Contra Costa County area between San Francisco and Oakland, between Port Chicago and Antioch via Pittsburg, between Pittsburg and Antioch via Camp Stoneman, and between Martinez Junction and Camp Stoneman, via Concord Junction and Camp Stoneman Junction; and in the Peninsula area between San Francisco and Palo Alto, via San Mateo and also via Bellehaven, between San Francisco and Half Moon Bay, and between Half Moon Bay Junction and Crystal Springs Dam; with the latter two routes restricted to service during the summer months. Pacific would serve all intermediate points on these routes except those on the segment between Freeway Junction and Airport Overpass, which is southwest of San Francisco International Airport. With a few exceptions, the authority sought by Pacific in No. MC-1511 (Sub-No. 103), duplicates and constitutes part of the routes which Golden Gate would acquire in No. MC-F-5643. As long as it is able to secure access into and out of San

San Francisco on its long-haul operations, Pacific would accept any restriction that might be imposed.

Golden Gate would operate under the same schedules now observed by Pacific. If necessary in the performance of the "local" service, Pacific would lease additional buses, up to 100, to Golden Gate at a rental based on the actual cost to Pacific of supplying the buses, including depreciation and a return on investment. Those terminals handling a preponderance of local traffic would be transferred to Golden Gate. Those terminals owned by Pacific, such as the ones at San Rafael and Palo Alto, would be leased to Golden Gate at a rental covering depreciation, taxes, and return on investment, and Pacific's leases on terminals such as those at Redwood City, San Mateo, and the San Francisco Ferry Building terminal, the latter exclusively used for commutation purposes, would be assumed by Golden Gate. Pacific would pay for its continued use of the first four terminals on a commission basis, Golden Gate would operate from Pacific's terminal at Oakland on a commission basis, and a portion of the cost of operating Pacific's San Francisco Seventh Street terminal would be allocated to Golden Gate on a trip basis. Charges, consisting of rentals, taxes, and insurance, to be assumed by Golden Gate with respect to terminal facilities aggregated approximately \$26,500 a year as of April 14, 1954.

Pacific's servicing and maintenance facilities in San Francisco would be available to Golden Gate on a joint facility basis, with Golden Gate responsible for direct costs and its allocable share of overhead ex-

penses. Gasoline and oil would be furnished at cost. Golden Gate's offices would be located temporarily at the Seventh Street terminal in San Francisco, and it would be free to change any existing arrangements with respect to terminal, maintenance or other facilities. Golden Gate would have a separate management under a president or manager skilled in mass transportation. However, Pacific's representatives would at all times constitute a majority of Golden Gate's board of directors, although none would be directors of Pacific, and the board would include a representative from each of the areas served who would give particular consideration to the problems of his specific area.

Golden Gate would hire those employees of Pacific directly engaged in the local services who desire to transfer, and would assume all of Pacific's obligations to such employees under the terms of the collective bargaining agreement now in effect between Pacific and the Union. Pacific claims there would be no loss of employment. It is expected that approximately 310 drivers, 11 station employees, 13 supervisors and between 10 and 20 accounting and clerical employees would be transferred to Golden Gate. Pacific is willing to accept such protective conditions for employees as we may impose, but the Union has not indicated any withdrawal of its opposition by reason of this statement by Pacific.

Under the agreement between the parties, Pacific would not conduct any "local" services in the area except that it would transport passengers moving in

interstate commerce on its through buses over its retained routes. In other words, where permitted by the rights, applicants would have an arrangement for the optional honoring of interstate tickets in any area where a better service could be provided through such an arrangement. A joint fare arrangement between Golden Gate and Pacific is also contemplated to facilitate transfers of passengers at connecting points, although from past experience, it is not anticipated that such interline traffic would be substantial. Pacific would not transport any passengers in intrastate commerce over Golden Gate's routes, except to or from points beyond. It will be noted that this entails the transfer to Golden Gate of intrastate operating rights over the routes indicated, and the retention by Pacific of authority to transport intrastate traffic over certain of the same routes in its long-haul operations—some-what similar to the proposal for the transportation of interstate traffic, which occasioned the filing of the application in No. MC-1511 (Sub-No. 103). There is some question in the record as to whether Pacific would continue to hold intrastate rights between Redwood City and San Francisco. However, Pacific would continue to hold intrastate rights, duplicating portions of intrastate authority being transferred to Golden Gate, within the cities of San Francisco, Oakland and Pittsburg over routes considered essential for the conduct of its intercity operations.

In addition to those routes over which Pacific would continue to operate in interstate commerce, transporting passengers between the same points, there is, and

would continue to be, traffic in interstate commerce to and from points on routes which would be served only by Golden Gate, and as illustrative of this, the evidence shows that during the month of October 1953, 60 passengers purchased tickets at such points in Marin County (11 at Sausalito, 9 at Mill Valley, 3 at Fairfax, 13 at San Anselmo, 14 at Marin City, and 10 at Hamilton Field), for revenue of \$1,656; 36 at points in the Peninsula area (12 at San Bruno, 22 at Burlingame-Howard, and 2 at Millbrae), for revenue of \$642; and 54 at points in Contra Costa County (8 at Lafayette, 22 at Walnut Creek, 1 at Monument, and 23 at Concord), for revenue of \$1,175; or a total of 150 passengers and \$3,473. This compares with additional interstate tickets purchased during the same month by 523 passengers, for total revenues of \$13,980, at stations, other than San Francisco and Oakland, to be served by both Golden Gate and Pacific.⁶ It is estimated that if Golden Gate had operated over the considered routes for the entire year 1953, it would have received \$3,694,600 in passenger revenue from both its interstate and intrastate traffic.

Pacific's balance sheet as of October 31, 1953, shows the following:

⁶The above figures for October 1953 show ticket sales outbound from the given points. However, it is estimated that the volume of interstate traffic flowing into the territory is approximately the same.

ASSETS

Current		
Cash	\$1,510,658	
Temporary cash investments	4,842,189	
Accounts receivable (net)	1,904,945	
Material and supplies	562,762	\$ 8,820,554
		<hr/>
Tangible property, less depreciation		18,163,410
Intangible Property (net)		3,890,368
Investment securities and advances		
Associated and subsidiary companies... \$	657,633	
Other	184,034	841,667
		<hr/>
Special funds		6,707,017
Déferred debits		281,526
		<hr/>
Total assets		<u><u>\$38,704,542</u></u>

LIABILITIES

Current		
Accounts payable	\$6,729,335	
Taxes accrued	4,817,224	
Other current liabilities	668,681	\$12,215,240
		<hr/>
Advances payable		55,397
Equipment obligations		66,299
Deferred credits		49,462
Reserves		3,291,194
Capital stock		14,595,000
Earned surplus		8,431,950
		<hr/>
Total liabilities		<u><u>\$38,704,542</u></u>

INCOME STATEMENTS

	Net Income	
	Before Taxes	After Taxes
1951	\$7,289,617	\$3,368,751
1952	6,506,374	3,303,874
1953 (first 10 months)	6,973,269	2,980,269

Golden Gate's balance sheet giving effect to the proposed transaction as of April 1, 1954, would have

shown assets aggregating \$1,455,960, consisting of \$150,000 in cash, the 52 new buses, 138 additional buses, and 194 cash fare boxes, having net book values of \$1,155,960, \$130,537, and \$19,461, respectively, and intangible property \$2. Its liabilities⁷ would have consisted of equipment obligations totaling \$982,566 on the 52 buses, represented by conditional sales contracts to be assigned to Golden Gate, payable in 24 quarterly installments at 3¾ percent interest on the unpaid balance, with \$163,761 due within one year and \$818,805 due after one year; open account indebtedness of \$173,394 to reimburse Pacific for its payments on the new buses; and \$300,000 in par value common stock to be issued to Pacific.

A pro forma income statement shows that if Golden Gate had conducted the "local" services, it would have had an estimated net operating loss of \$234,300 for 1953 under then existing effective fares. At the time of the hearing Pacific had pending an application before the California Commission, filed on May 18, 1953, seeking an increase in its fares for operations in the Marin County area and, to a much smaller extent, in another county not here involved. Applicants estimated that the granting of the requested increase would provide additional annual revenue to Golden Gate of \$254,000, thus changing Golden Gate's estimated deficit into an estimated net income of \$19,700. However, since issuance of the proposed report, the California Commission, on November 4, 1954, author-

⁷Golden Gate would assume no obligations and would issue no notes or other securities within the meaning of section 214.

ized an increase which, according to the report of the California Commission attached to applicant's exceptions, will produce estimated additional revenue of about \$84,000 a year. The California Commission, in granting that increase, recognized that if the then existing fares were continued during the year ending June 30, 1955, an estimated loss of \$389,800 would be sustained for the Marin County operations, and that Pacific's losses for its overall California intrastate operations would be \$1,202,200.⁸ The California Commission explained that although the granted increase still would not provide sufficient revenue to cover the cost of the Marin County operations, a sharp increase as proposed by Pacific would also fail to place the Marin County operations on a self-sustaining basis, because the law of diminishing returns would cause diversion from Pacific of a substantial part of its commutation patronage. To the extent this additional revenue may be applicable to the Marin County operations, the proportion or amount of which is not indicated, Golden Gate's estimated deficit would be decreased.⁹

The operations which Golden Gate would acquire involve the transportation, over short distances, principally of daily commutation passengers at special fares, with the peak traffic volume being inbound to

⁸This figure includes consideration of a downward trend of traffic among other things.

⁹Counsel for Pacific stated at the oral argument that a petition for rehearing has been filed in that proceeding, and also that an application for an increase in fares on the Peninsula had been filed with the California Commission.

San Francisco between the hours of 7 a.m. and 9 a.m., and outbound between the hours of 4:30 p.m. and 6:30 p.m. In the case of Marin County traffic, 90 transit-type buses are operated by Pacific during a peak period, whereas service on that route during the balance of the day requires only 19 buses, the remaining buses and drivers being idle during the off-peak period. The Contra Costa operation is similar to the Marin County service, although the traffic volume is not as great. The Peninsula traffic is subject to less pronounced peaks because the Southern Pacific Railroad provides for the great bulk of the commutation service in that area. In contrast to the mass transportation problem, Pacific's intercity or mainline traffic does not consist of regular daily passengers, the usual one-way and round-trip fares are charged instead of reduced commutation fares, longer trips are involved, and mainline equipment is utilized. A single contract with the Union covers employees of both the "local" and long-distance services, although it includes separate sections that apply specifically to the different services, one of the principal differences being the payment of mainline drivers generally on a mileage basis, whereas "local" drivers are paid on an hourly basis. No other company in the Greyhound system operates a commutation service of the character or magnitude of that existing in the San Francisco Bay area and Pacific has no comparable "local" or commutation service in any other area.

To show that the transaction would be consistent with the public interest, applicants submitted evi-

dence concerning certain historical "problems" which, they contend, would be solved by this proposal. It appears that prior to the recently authorized increase, only minor adjustments had been made in the commutation fares since 1940 or 1941, despite an increase, according to Pacific, of over 100 percent in the cost of providing the service; and during 1953, Pacific sustained a deficit of \$234,300 in conducting these operations. On the other hand, Pacific contends that the fares of two other commutation services, operating in the San Francisco and Los Angeles areas, have been increased by over 100 percent since 1941. This depressed fare structure, applicants maintain, has resulted in a loss of practically all of Pacific's capital investment in the local operations, and losses in Marin County operations alone have exceeded \$2,000,000 since inception of that service in 1941. Pacific attributes this situation to the rate-making policy of the California Commission, which the commuter organizations defend. Pacific contends that this policy has required the subsidization of the services under these commutation fares by the revenue from the systemwide intercity operations, without regard to the circumstances and costs of the "local" operations, and that this has seriously affected its ability to compete in the face of a declining traffic volume. The insistence by the California Commission upon the preparation and submission of systemwide statistics and accounting in the determination of proceedings involving the "local" commutation fares has increased Pacific's costs and required the maintenance of records and statistics,

which applicants contend, could be eliminated under the proposed separation, resulting in substantial savings. Applicants further submit that in addition to the savings resulting from the simplification of rate proceedings and maintenance of records, other savings, such as in station and insurance expense, may be realized by the separation because of operational and managerial improvements and abandonment of main-line carrier practices in the local operations.

Applicants emphasize that the proposed separation will effectively resolve existing problems of management. While Pacific's long-haul operations are the source of its financial strength, producing 90 percent of the system revenue, the exacting demands of the commuters have caused its president to devote 15 percent of his time to the "local" operations, its auditor and his staff 70 percent, and its vice president in charge of operations 25 percent.

In order to advise and assist Pacific in the organization of Golden Gate, to select the management for the latter and to recommend policies in the operations of a truly suburban service by Golden Gate, Pacific has engaged an expert with 30 years' experience in local transit operations. He expressed the opinion that there should be a complete separation since the service which Golden Gate would render is distinct, from an economic and traffic standpoint, from that which Pacific would continue; and that the proposed operation by Golden Gate is entirely feasible and would be more easily adaptable to the special needs of its patrons and to integration with local activities and over-all plan-

ning.¹⁰ He stated that the interests of Pacific's management lie elsewhere; that the management problem will not be solved unless a separate corporation is set up because "you can't serve two masters"; that establishment of a separate management in charge of local operations subject only to supervision by Pacific's board of directors, which would not be "local" minded, is impractical; and that Golden Gate should have a separate board of directors, a majority of which should be local representative from the areas served.

Part of the overall management problem is that of labor-management relations which, although strongly disputed by the Union, applicants contend would benefit from the proposed separation of the operations. The negotiation of employment contracts with the Union in the past has been made especially difficult because the terms applicable to the two classes of drivers have been embraced in a single labor agreement, even though the operating practices have been different. As an illustration, the current agreement was negotiated following settlement of a strike which forced suspension of Pacific's entire operations for 79 days, the principal issue being the Union's demand for a five-day week for the mainline drivers, based on the

¹⁰The California State legislature has appropriated funds for a survey of the transportation system in the area, and it is contemplated that a San Francisco Bay Area Rapid Transit District will be established to relieve traffic congestion. All the territories to be served by Golden Gate are within the boundaries of the proposed transit district, and it is expected that the "local" operations would be integrated into, and supplement other services in, such a transit system, thus making it possible for patrons to travel between any points in the entire transit district. The study will probably not be completed before the end of 1955.

fact that the "local" drivers were granted a 5-day week, thus making Pacific the first major motorbus carrier in the United States to make such a concession. In addition, Pacific claims that the ill will engendered by the unfavorable publicity incident to its "local" difficulties has reflected upon its reputation and has affected the volume of long-haul traffic it secures in this area.

Although not an intervener in this proceeding, on March 23, 1954, the Secretary of the California Commission addressed a letter to us, a copy of which was transmitted to Pacific and introduced in evidence by the latter, stating the position of that Commission to be that the proposed transfer of the "local" operations is wholly unnecessary, would create a questionable expense, and would tend to create uncertainty and confusion when the fixing of intrastate rates for Golden Gate might be considered; that the capital structure of Golden Gate would be of questionable soundness; that it would not recognize any transfer of the intrastate operating rights without its approval; and that the transfer would be contrary to the public interest unless conditioned to provide (a) that neither Golden Gate nor Pacific will ever claim or urge that Pacific's total intrastate operating results should not be considered for the purpose of prescribing intrastate rates for Golden Gate, (b) that Pacific shall agree to take back the operations from Golden Gate if and when ordered to do so either by this Commission or the California Commission, and then to restore the operations to the status and con-

dition existing at the time of the transfer to Golden Gate, and (c) that Pacific and Golden Gate shall file written undertakings agreeing to the two stated conditions.

Pacific, reiterating that the local operations should be self sustaining, states that the first proposed condition is unacceptable. At the hearing, Pacific's vice president in charge of operations stated that Pacific also would not be willing to accept the second proposed condition, although in a letter to the California Commission, dated a week prior to the hearing, Pacific's president, with the concurrence of the vice president, stated that while imposition of the second condition would not be just, reasonable, or necessary, he felt that Pacific would accept it if we were to condition our order in these proceedings to require Pacific to agree that within some specified period it would take over Golden Gate's operations, upon order, after hearing, of this Commission.

The Union, the Counties, and the Commuter Associations collectively question the jurisdiction of this Commission over the proposed transaction under section 5 on the ground that Golden Gate is not a "carrier" as defined in the act, that it must first acquire the status of a "carrier" before jurisdiction attaches under section 5, and that the proposed transaction therefore, is not within the scope of section 5(2)(a)(i) which may be authorized. It is apparent that if the transaction were accomplished without our prior authority it would be in violation of section 5(4). Jurisdiction is determined on the basis of facts

isting at consummation, and Greyhound proposes to acquire control of Golden Gate concurrently with its becoming a carrier through the purchase. Jurisdiction has been asserted in numerous similar cases and is clear under section 5. *Columbia Motor Service Co.—Purchase—Columbia Terms. Co.*, 35 M.C.C. 531. Jurisdiction over a transaction which is subject to section 5 is exclusive and plenary under the plain language of paragraph 11 of section 5, and, upon our approval of such a transaction, the applicants would have full power to "carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority".

The Union further argues that the transaction is contrary to this Commission's long-standing policy favoring corporate simplification, and would adversely affect transportation service to the public in that (1) Golden Gate would not be financially capable of insuring continued service, (2) less service would be provided to the commuters who already find existing service inadequate and who would be deprived of their present option of riding on either intercity or local buses, (3) the extensive shifting, as a result of the transaction, of employees between the "local" and intercity operations would reduce labor efficiency and result in loss of time and expense to the employer and employee, and, in some instances, cause a loss of jobs, (4) the lowered morale resulting from the shifting of personnel, the negotiation of two labor contracts in-

stead of one, and the creation of smaller collective bargaining units which would tend to diminish the restraining influences of varying interests within the unit, would increase the possibilities of strikes, probably resulting in service interruptions in both companies, and (5) the proposal would result in high costs to both companies.

The Counties and the Commuter Associations, like the Union, point to Golden Gate's limited capital, the possible impairment of labor relations, and question whether any savings would result which could not as easily be realized by conducting the "local" operations as an independent division. They argue that the separation of management can be accomplished as well by the creation of a separate operating division as by the creation of a subsidiary corporation, pointing to the pending application wherein Pacific would be merged into its parent company and operated as a division of that carrier; that the real reason for the proposal is to disconnect the local operations for rate-making purposes, and thus defeat the California Commission's practice of determining proposed fare increases for the "local" operations in the light of Pacific's systemwide operations and revenues; and that the public would be prejudiced by the establishment of Golden Gate's future fares. They argue at some length in support of the rate-making policy of the California Commission, contending that the losses experienced by Pacific in the "local" operations because of the low fares are counterbalanced by the excessive rate of return in other parts of Pacific's system where the

fares cannot be reduced because of the revenue needs of Pacific's competitors. These interveners urge that the matter of separating these operations, which are primarily in intrastate commerce, be left to the California Commission.

In their exceptions and at the oral argument, applicants argue that the examiner erred in not finding that substantial benefits in management, operations, and public relations would result from consummation of the proposed plan in matters where the cooperation or lack of cooperation of the California Commission and the Union would make no difference; and they add that under present rules of the California Commission and according to practices applied in the treatment of other commutation subsidiaries, simplified accounting and expeditious handling of rate cases, without regard to system earnings, will result from the separation. Pacific expects Golden Gate to be self-sustaining if present gross revenues from the "local operations of nearly \$4,000,000 are increased by 20 to 25 percent through an upward adjustment of fares. Counsel for Pacific stated at the oral argument that he believed Pacific would accept a condition requiring it to furnish more working capital to Golden Gate than the proposed \$150,000, and he renewed the offer to accept a condition to approval herein, requiring Pacific to agree that within a specified period it would take over the operations of Golden Gate if we should order it to do so. Applicants insist in their argument that section 5 of the act does not require a showing that the proposed plan will result only in

affirmative public benefits or that all benefits possible of accomplishment will be accomplished, affording a solution to all existing problems, nor must improved service to the public be shown, but that probable benefits to the entire public, intercity patrons as well as commuters, must be balanced against probable injuries, and that a plan, proposed in the carrier's managerial discretion, should be approved unless found to be "contradictory", "Hostile" or injurious to the public interest. Even if the California Commission and the Union do not treat the two corporations as separate entities, applicants state, the situation would be as it presently exists and the public interest would not be prejudiced; but the public interest will be promoted to the extent that any of the problems are alleviated. On the other hand, they submit, unless separation is authorized, existing problems will become aggravated when the dissimilar "local" operations become blanketed with the nationwide operations of Greyhound upon merger of Pacific with its parent.

Admitting that, through the proposed transaction, they hope to escape from the previously described rate-making practices and policies of the California Commission, applicants argue that we should be seriously concerned with the results of those practices and policies, and that we should approve the transaction to alleviate the burden placed on interstate commerce through the California Commission's policy of requiring a subsidization of intrastate operations by revenues derived from interstate operations, and thus further the national transportation policy by promot-

ing efficient service and fostering sound economic conditions in transportation.

Pacific states that after the transfer it would be necessary for it to continue operations over some of the same routes as Golden Gate in order to obtain access to its terminals in San Francisco and Oakland, but, if there is serious objection to this duplication, applicants would accept a condition, albeit reluctantly, whereby Golden Gate's duplicating interstate rights would be canceled upon consummation of the transaction. If this were done, the remaining interstate operating rights of Golden Gate would be negligible both from the standpoint of points and traffic.

The Counties and the Commuter Associations argue that the service in question, which is almost completely intrastate in character, should be left to local regulation, that this Commission should not set itself up as an appellate body to review the validity of rate orders of the California Commission, that it was never contemplated that this Commission should act in such a capacity, and that the proceedings before the California Commission are not a part of this record. They stress that Pacific is seeking relief here because it knows, from past experience, that the California Commission would not approve of Golden Gate's proposed financial structure, referring to the rejection by the California Commission of a proposed transfer in 1952 to an experienced operator of the Marin County operations on the ground that the proposed financial structure, involving the contribution of \$200,000 by the op-

erator, was inadequate. They urge that, although Pacific now asserts that the "local" operations constitute one geographic and economic unit distinct and separate from the intercity operations, it significantly decided against transferring ~~all~~ the "local" operations in 1952 and instead sought to transfer only the Marin County operations. These protestants submit that if the State Commission's rate-making policies are illegal, Pacific has an adequate remedy in the courts, of which it has not availed itself in connection with prior rate decisions of the California Commission. With respect to applicants' allegation that rate proceedings before that Commission have in the past been protracted, they point to adjournment requests by Pacific in the proceedings determined in 1954, and cite one instance in which a new application in 1950 was consolidated with pending proceedings, prior to determination of which an interim or emergency fare increase was granted.

The Union argues in its exceptions that the proposed report should have found that employees would be adversely affected by the transaction. It adds that, after careful study, the California Commission has concluded that the Marin County operations cannot be placed on a profitable basis merely by a fare increase, that it is evident that that Commission would not authorize substantially increased fares in the "local" operations, after separation, and even if such increases were permitted, any expected increase in revenues would be tempered by the loss of traffic resulting from any sharp increase in fares.

The phrase "consistent with the public interest" is broad in scope, as repeatedly stated by the courts, and we are plainly charged with the obligations, while keeping in mind the national transportation policy, of considering all matters of every character affecting the public interest which may result from a proposed transaction, including the weighing of prospective benefits to the public against any disadvantages which might be expected to result. However, our province is not to determine whether some plan other than the one proposed might be more advisable. Our function is to determine whether the plan presented will be consistent with the public interest, although we may require modification of the plan or impose conditions where necessary in the public interest.

While our policy has been to encourage corporate simplification, this policy should not be invoked so as to cause the impractical retention in a single entity of highly dissimilar operations, as here, especially if such retention causes the undesirable results shown by this record. As previously stated, the "local" and intercity services are different with respect to the nature of the service provided, the type of passengers carried, the mileage involved, and the type of equipment utilized. Pacific's public relations have suffered because of its difficulties with respect to its "local" operations, and its management has had to devote more time and energy to those operations than are commensurate with the comparative traffic and revenue producing results of this service. It is also apparent that in the past the commutation services have

been conducted at considerable losses, which have had to be borne from profits obtained from Pacific's system operations to the prejudice of its long-haul operations, and that even under the recent fare increase the "local" operations are not expected to produce revenues equalling the cost of providing the service. That increase, as explained by the California Commission, is expected to reduce anticipated losses on the Marin County operations, during the year ending June 30, 1955, by only about 22 percent.

As contended by applicants, we may not properly overlook the burden on the interstate operations of Pacific which the proposed transaction would alleviate. A new corporation, with a completely separate management experienced in "local" mass transportation, will be able to confine its attention to that service and thus conduct those operations more efficiently than the present management, whose main interests are concerned with the long-haul operations. At the same time, Pacific's management will be relieved of the necessity of conducting two dissimilar services, enabling it to concentrate exclusively on its intercity operations. This is especially important in view of the decline in Pacific's long-haul traffic, both interstate and intrastate. The same service now rendered would be provided by Golden Gate, and the same facilities would be available. While, as pointed out by the Union, commuters would not be permitted the option of riding on Pacific's through buses in the Marin County and Peninsula areas, very little commuter traffic has been handled on these through trips.

However, as previously shown, interstate passengers would, as now, have the option of riding on either intercity or local buses where the routes coincide, and a joint fare arrangement would facilitate transfers of passengers at connecting points. As Golden Gate's management would be more familiar with local conditions and more disposed to study the particular needs of its patrons, the probabilities of adjustments to provide better service and eliminate causes of any existing complaints would be increased. Ultimate integration into the contemplated rapid transit system should be facilitated.

Under the circumstances here, the soundness of Golden Gate's financial structure under the proposed financing is questionable. It is not our function in this proceeding to determine the justness and reasonableness of the intrastate fares in question or the lawfulness of the policies of the California Commission. Neither shall we attempt to prophesy the future action of that body in its rate proceedings. The amount of interstate traffic to be transported by Golden Gate would produce an estimated 5.7 percent of its total revenues, and less than 20 percent of this amount would be the result of a service by Golden Gate which could not also be provided by Pacific. Thus Golden Gate would essentially be a "local" operation and, as we shall find that the separation would be consistent with the public interest, the question as to the fares to be charged is one to be determined by the local authorities. However, as it appears that, if Golden Gate had conducted the "local" operations during the

year 1953, it would have had a deficit of approximately \$150,000, assuming that the estimated additional revenue of \$84,000 from the fare increase would decrease the expected deficit of \$234,300 by that amount, and as it would be obliged to incur equipment and other obligations, we are of the opinion that the contemplated cash investment in Golden Gate by Pacific of \$150,000 is insufficient, and that \$250,000 would be more appropriate to its needs. Our findings will be conditioned accordingly.

The Union's concern as to the adverse effects of the separation on employees seems unwarranted. Applicants have stated that there will be no loss of employment, and that existing terms and conditions of employment, seniority rights, pension, welfare, insurance, and hospital plans, and other benefits accorded to Pacific's employees would be extended to Golden Gate's employees. However, the Union has persisted in its opposition. Our approval of the transaction is with the expectation that applicants and the Union will make every effort to reach an agreement to protect all employees of Pacific and Golden Gate affected by the transaction, so that they will not be placed in any worse position than may be required by the exigencies of the situation. To insure such protection, our findings will be conditioned to reserve jurisdiction for a period of 2 years from date of consummation to make such additional findings and to impose such terms and conditions with respect to all employees of Pacific and Golden Gate as may be necessary to protect their interests.

As previously mentioned, at the hearing Pacific's vice president in charge of operations rejected the suggestion made by the California Commission in its letter of March 13, 1954, that we should impose a condition requiring Pacific to take back Golden Gate's operations if and when ordered to do so by either this Commission or the California Commission. However, at the oral argument, counsel referred to a letter dated April 7, 1954, prior to the hearing, wherein Pacific's president stated that it would agree that, within a specified period, it would take back Golden Gate's operations upon our order, after hearing. We doubt the wisdom of approving such a transaction as this on an experimental basis. Also the problems which would be attendant upon the possible entry of such a mandatory order, such as the necessity for periodic inspection of Golden Gate's books and appraisal of its operations and financial condition to decide whether the proceeding should be reopened for hearing to determine whether such an order should be entered directing a reunification of the operations, make such a condition of doubtful practicability. We are of the opinion that the question of possible future reunification of these operations is one which properly should be left to applicants' management.

The proposed plan contemplates the holding of duplicating operating rights by both carriers. As previously mentioned, as long as it may continue to serve San Francisco in its long-haul operations, Pacific would accept any restriction that might be imposed to limit its service over the coinciding routes, and

applicants specifically suggest a condition requiring cancellation of all duplicating-interstate operating rights of Golden Gate. It might be noted, however, that any restriction on Pacific's authority to serve intermediate points, but with Golden Gate authorized to serve those points, might react to the detriment of long-haul passengers who would be compelled to use Golden Gate and change buses. Also, while any lack of authority in Golden Gate to operate in interstate commerce over the duplicating routes would not be of too great significance, so far as the traveling public is concerned, retention of such authority would enable some intercity passengers to use the equipment of either Pacific or Golden Gate, and, in addition, would provide Golden Gate with some additional revenue. We are therefore of the opinion that the holding of authority to provide duplicating service may, in this instance, be found to be consistent with the public interest.

We find, in No. MC-F-5643, that acquisition by Pacific Greyhound Lines of control of Golden Gate Transit Lines through ownership of capital stock, the contemporaneous purchase by Golden Gate Transit Lines of the presently-described operating rights and property of Pacific Greyhound Lines, and the acquisition by The Greyhound Corporation of control of Golden Gate Transit Lines, and of the operating rights and property through the transaction, upon the terms and conditions set forth herein, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a), and

will be consistent within the public interest, and that, if the transaction is consummated, Golden Gate Transit Lines will be entitled to a certificate covering the said portions of the operating rights granted in No. MC-1511 and subnumbered proceedings as specifically set forth in appendix A hereto; *provided, however*, that if the authority herein granted is exercised, the amount of the cash payment to be made by Pacific Greyhound Lines to Golden Gate Transit Lines shall be \$250,000; *provided further* that, if the authority herein granted is exercised, the authority of Pacific Greyhound Lines to operate, over an alternate route, between Danville and Dublin, Calif., over California Highway 21 shall be cancelled; *provided, further*, that, if the authority herein granted is exercised, Golden Gate Transit Lines, shall amortize in equal monthly amounts over a maximum period of three years, commencing with the date of consummation of the purchase, the amount assigned to its "Other Intangible Property" account as a result of the transaction, or, in lieu of amortization in any month of the three year period, it may write off the unamortized balance of the amount so assigned, and Pacific Greyhound Lines shall immediately write off the excess, if any, of the consideration paid over the net book value of the stock of Golden Gate Transit Lines, which it would acquire, excluding intangibles, as of the date of consummation, such amortization and write-off to be accomplished in the manner to be determined upon submission of a statement showing all expenditures and the accounting proposed to record the transaction as required by our

order herein; and *provided, further*, that, if the authority herein granted is exercised, jurisdiction shall be reserved for a period of 2 years from the date the transaction is consummated in order to make such additional findings and to impose such terms and conditions with respect to employees of Pacific Greyhound Lines and of Golden Gate Transit Lines, as may be necessary and lawful, if, upon petition by any of the said employees or their representatives, within that period, it is shown that the conditions of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done pursuant to, or as direct result of, the consummation of the transaction under the authority herein granted; and that consummation of the transaction by applicants will be considered acceptance of the said reservation of jurisdiction.

We further find, in No. MC-1511 (Sub-No. 103), that, in connection with the transaction herein authorized, the public convenience and necessity require the continuance by Pacific Greyhound Lines of its operations in interstate or foreign commerce as a common carrier by motor vehicle, of passengers and their baggage, and express, mail, and newspapers, in the same vehicle with passengers, between the termini; over the routes, and to and from the intermediate points specified in appendix B hereto; that Pacific Greyhound Lines is fit, willing and able properly to perform such service; and that, upon consummation of the transaction herein authorized, and upon compliance with sections 215 and 217 of the act and the rules,

regulations, and requirements thereunder, it will be entitled to a certificate of public convenience and necessity authorizing such operations.

An appropriate order will be entered.

Commissioner Hutchinson, being necessarily absent, did not participate in the disposition of these proceedings.

Appendix A

Interstate operating rights of Pacific Greyhound Lines to be acquired by Golden Gate Transit Lines under the findings in the report. All authority is over regular routes in California, in both directions, serving all intermediate points, unless otherwise noted.

Passengers, and their baggage, and express, mail, and newspapers, in the same vehicle with passengers,

MARIN COUNTY ROUTES

Between Novato and San Francisco:

From Novato, over U. S. Highway 101 to San Francisco.

Between San Rafael and Corte Madera Road Junction:

From San Rafael, over unnumbered highway via San Anselmo and Corte Madera to junction U. S. Highway 101 (Corte Madera Road Junction).

Between Inverness and San Anselmo:

From Inverness, over unmarked county highway to junction California Highway 1 (Point Reyes Station), thence over unnumbered highway to Fairfax, thence over Sir Francis Drake Boulevard to San Anselmo.

Between Kentfield Corners and Greenbrae:

From junction unnumbered highways north of Kentfield (Kentfield Corners), over Sir Francis Drake Boulevard to junction U. S. Highway 1 (Greenbrae).

Between Mill Valley and Manzanita:

From Manzanita over unnumbered highway to Alto, thence over Blithedale Avenue and Throckmorton Street to Mill Valley.

Between Mill Valley and Tamalpais High School:

From Tamalpais High School over Miller Avenue to Mill Valley.

Between Alto and Belvedere:

From Alto over Alto Highway to Tiburon Wye, thence over unnumbered highway to Belvedere.

Between Belvedere Junction and Tiburon:

From junction unnumbered highways northwest of Belvedere (Belvedere Junction), over unnumbered highway to Tiburon.

Exhibit B

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 6th day of July, A.D. 1955.

No. MC-F-5643

The Greyhound Corporation—Control; Pacific Greyhound Lines—Control; Golden Gate Transit Lines—Purchase (Portion)—Pacific Greyhound Lines

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That acquisition by Pacific Greyhound Lines, of San Francisco, Calif., of control of Golden Gate Transit Lines, also of San Francisco, through ownership of capital stock, and for the contemporaneous purchase by Golden Gate Transit Lines of certain operating rights and property of Pacific Greyhound Lines, and acquisition by the Greyhound Corporation, of Chicago, Ill., of control of Golden Gate Transit Lines, and of the operating rights and property through the transaction, be, and they are hereby approved and authorized, subject to the terms and conditions set out in the findings in said report.

It is further ordered, That, if the parties to the transaction herein authorized desire to consummate

same, they shall (1) promptly take such steps as will insure compliance with sections 215 and 217 of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (2) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That, if the authority herein granted is exercised, Pacific Greyhound Lines and Golden Gate Transit Lines shall submit for consideration and approval, a sworn statement and one copy thereof showing all expenditures made, by dates, or to be made, in connection with the transactions authorized, including the consideration, legal and other fees, commissions, and any other cost incidental to the transaction, the assets acquired, and the liabilities assumed, indicating the account number and title to which each item has been, or is to be debited or credited.

It is further ordered, That the authority herein granted shall not be exercised prior to the effective date hereof, and that this order shall be effective on August 24, 1955.

It is further ordered, That unless the authority herein granted is exercised within 180 days from the effective date hereof, this order shall be of no further force and effect.

And it is further ordered, That recital in said report of balance sheet and other financial data shall not be construed as approving accounting methods which

have been followed or expenditures represented thereby.

By the Commission.

Harold D. McCoy
Secretary.

(SEAL)

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MAR 6 1958

JOHN T. FEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA
COSTA, MARIN COUNTY FEDERATION
OF COMMUTERS CLUBS, and CONTRA
COSTA COUNTY COMMUTERS ASSOCIA-
TION,

Appellants,

VS.

UNITED STATES OF AMERICA, INTER-
STATE COMMERCE COMMISSION, GOLDEN
GATE TRANSIT LINES, PACIFIC GREY-
HOUND LINES, and THE GREYHOUND
CORPORATION,

Appellees.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Southern Division.

BRIEF OF APPELLANTS.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA
COSTA, MARIN COUNTY FEDERATION
OF COMMUTERS CLUBS, and CONTRA
COSTA COUNTY COMMUTERS ASSOCIA-
TION,

Appellants,

vs.

UNITED STATES OF AMERICA, INTER-
STATE COMMERCE COMMISSION, GOLDEN
GATE TRANSIT LINES, PACIFIC GREY-
HOUND LINES, and THE GREYHOUND
CORPORATION,

Appellees.

**Appeal from Judgment of the United States District Court
for the Northern District of California,
Southern Division.**

BRIEF OF APPELLANTS.

I. OPINIONS OF THE COURT BELOW.

The decision and opinions of the District Court are reported at 150 F. Supp. 619 and are set forth in the

printed record herein at pages 111-18 (majority opinion), 119-24 (concurring and dissenting opinion), and 124-5 (judgment). The decision of the Interstate Commerce Commission appears in the printed record at pages 8-41.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED.

This action was commenced in the Court below to set aside an order of the Interstate Commerce Commission which authorized Pacific Greyhound Lines, a common carrier of passengers to transfer certain of its local bus operations in the San Francisco Bay Area to its newly created subsidiary, Golden Gate Transit Lines, without the necessity of obtaining the approval of the Public Utilities Commission of the State of California, under whose jurisdiction substantially all the operations are conducted. The District Court had jurisdiction under Sections 2321-5, 2284, 1366, and 1398, of Title 28 of the United States Code, and pursuant thereto a three-judge Court was convened for the purpose of hearing the matter (R. 50-51).

The judgment of the District Court sustaining the order of the Interstate Commerce Commission was dated and entered May 3, 1957 (R. 124-5). The notice of appeal was filed with the Clerk of the District Court on May 29, 1957 (R. 126-8). On June 27, 1957, the time for docketing the case and filing the record thereof with the Clerk of this Court was enlarged to and including September 2, 1957 (R. 130). The order of this Court noting probable jurisdiction was entered

on November 12, 1957 (R. 131), _____ U.S. _____, 78 S.Ct. 116. This Court has jurisdiction pursuant to Sections 1253 and 2101 of Title 28, and Section 45 of Title 49 of the United States Code.

III. STATUTES INVOLVED.

The case involves the meaning and effect of the following Sections of the Interstate Commerce Act and of Rule 15(a) of the Federal Rules of Civil Procedure:

A. Section 5(2)(a), (4), (11), and (13) of the Interstate Commerce Act (U.S. Code, Title 49, Section 5(2)(a), (4), (11), and (13)), reading as follows:

“Sec. 5. * * *

“(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

“(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a

carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or
 “(ii) for a carrier by railroad to acquire trackage rights over; or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.”

* * *

“(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words ‘control or management’ shall be construed to include the power to exercise control or management.”

* * *

“(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a cor-

porate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, (the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

“(13) As used in paragraphs (2) to (12), inclusive, the term ‘carrier’ means a carrier by railroad and an express company, subject to this part; a motor carrier subject to part II; and a water carrier subject to part III.”

B. Sections 203(a)(14) and (16) and 212(b) of the Interstate Commerce Act (U.S. Code, Title 49, Sections 303(a)(14) and (16) and 312(b)), reading as follows:

“Sec 203(a) As used in this part—

* * *

“(14) The term ‘common carrier by motor vehicle’ means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.”

* * *

“(16) The term ‘motor carrier’ includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.”

* * *

“Sec. 212. * * *

“(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.”

C. Rule 15(a), Federal Rules of Civil Procedure, reading as follows:

“(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.”

IV. QUESTIONS PRESENTED.

A. Does the exclusive and plenary power of the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act to authorize transfer of both interstate and intrastate operating rights of carriers in connection with mergers, consolidations, and acquisitions of common control of carriers, extend to a proposed split-up of motor carrier operating rights under which an existing carrier would transfer predominantly intrastate operations to a newly-created subsidiary not yet performing any operations; or does the transfer of operating rights under such a split-up fall under Section 212(b) of the Interstate

Commerce Act with respect to the interstate operations and under the jurisdiction of the appropriate state agency with respect to the intrastate operations?

B. Where the original complaint raised only the legal question of the jurisdiction of the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act to issue the order under review, was it an abuse of discretion for the lower Court to deny appellants' motion, made at the time of argument of that legal question, to amend the complaint so as to present the additional questions of whether there was sufficient evidence to support the findings of the Interstate Commerce Commission and whether the Interstate Commerce Commission abused its discretion in denying appellants' petition for rehearing, where the failure to raise the additional grounds in the original complaint was based on a judgment decision of the attorney and not on inadvertence, mistake, or neglect, and where there was no unreasonable delay or prejudice to the other parties?

V. STATEMENT OF THE CASE.

This case involves an attempt by a large motor coach operator conducting extensive bus operations in both interstate and intrastate commerce to transfer its suburban operations in the San Francisco Bay Area to a subsidiary corporation organized specifically for that purpose, without obtaining the approval of the Public Utilities Commission of the State of California.

On February 8, 1954, Pacific Greyhound Lines (hereinafter called Pacific Greyhound), Golden Gate Transit Lines (hereinafter called Golden Gate), and The Greyhound Corporation filed applications with the Interstate Commerce Commission seeking authority under Section 5(2) of the Interstate Commerce Act for the transfer to Golden Gate of certain passenger bus operations conducted by Pacific Greyhound in the San Francisco Bay Area in exchange for the issuance to Pacific Greyhound of all of Golden Gate's outstanding capital stock (R. 9). The Greyhound Corporation was a party to the application, because it controlled Pacific Greyhound through ownership of a majority of the latter's outstanding capital stock (R. 9).

Golden Gate was incorporated on May 7, 1953. It has engaged in no business activities and has not at any time been a motor carrier (R. 11-12).

Pacific Greyhound operates as a motor common carrier of passengers pursuant to Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission between points in California, Oregon, Nevada, Utah, Texas, Arizona, and New Mexico (R. 10). It also conducts extensive intrastate operations in California under Certificates of Public Convenience and Necessity issued by the Public Utilities Commission of that State (R. 11).

The operations which this case involves consist of suburban bus service between San Francisco and the area within a radius of 25 to 30 miles extending to Marin County on the north, Contra Costa County on

the east, and the Peninsula area on the south (R. 11). In terms of revenue, only 5.7% of the traffic involved in these local operations consists of passengers utilizing the local service as a part of an interstate trip, and the remaining 94.3% is intrastate traffic consisting largely of the transportation of commuters between their offices in San Francisco and their residences in the outlying areas (R. 29, 11).

After the hearing officer had recommended denial of the applications, the Interstate Commerce Commission reviewed the matter and issued its order on July 6, 1955, granting the applications and authorizing the transfer under Section 5 (R. 8-9, 40-41). If Section 5 applies, the transaction may be consummated without obtaining the approval of the California Public Utilities Commission.

The admitted purpose of Pacific Greyhound, in seeking to transfer its San Francisco Bay Area operations to a separate corporation, is to escape the rate-making practices and policies of the California Public Utilities Commission (R. 25), which has held that Pacific Greyhound's applications for increases in rates in these local operations should be determined in the light of Pacific Greyhound's total earnings from all of its intrastate operations in California. *Re Pacific Greyhound Lines*, 50 Cal. P.U.C. 650 (1951); *re Pacific Greyhound Lines*, 55 P.U.C. 641 (1957).

Under the terms of the transaction, as outlined in the applications, Pacific Greyhound would transfer to Golden Gate its operating rights in the area in question, \$150,000.00 in cash, 138 transit-type buses,

and Pacific Greyhound's equity in 52 buses recently purchased under conditional sales contracts, together with certain miscellaneous property, and in exchange Golden Gate would issue to Pacific Greyhound all of its capital stock consisting of 300,000 shares of \$1.00 par value common, would assume the outstanding indebtedness on the 52 buses, and would be indebted to Pacific Greyhound on an open account basis for the difference between the net book value of the buses and the amount of the outstanding indebtedness thereon at the date of consummation (R. 12). As of April 1, 1954, just prior to the public hearing before the Interstate Commerce Commission examiner, the outstanding indebtedness on the 52 buses was \$982,566.00, on which \$163,761.00 was due within one year and the balance of \$818,805.00 was payable in the succeeding five years; and the open account indebtedness representing Pacific Greyhound's book equity in the new buses would have been \$173,394.00 as of that date (R. 17). A *pro forma* income statement, submitted by Pacific Greyhound and Golden Gate at the public hearing, showed that if Golden Gate had been conducting the operations in question during the year 1953 under the fares existing at that time, it would have incurred a net operating loss of \$234,300.00 (R. 17). The Interstate Commerce Commission found that the proposed transaction was consistent with the public interest within the meaning of Section 5(2)(a) and authorized its consummation, with the condition, however, that the amount of cash payment from Pacific Greyhound to Golden Gate should be \$250,000.00, instead of \$150,000.00 (R. 31).

A petition for rehearing and reconsideration (R. 79-87) was filed with the Interstate Commerce Commission by appellants on August 11, 1955, and was denied by the Commission on September 19, 1955 (R. 5). In this petition, appellants sought permission to present evidence that on July 28, 1955, the Vice-President of Pacific Greyhound gave testimony before the California Public Utilities Commission, in connection with the inclusion of working capital in the rate base for purposes of determining fair and reasonable rates, that the necessary working capital for the operations in question consisted of an amount equal to the average monthly cash expenditures, which, as applied to this case, would amount to \$321,183.00.

The petition pointed out that this testimony was contrary to the contention of Pacific Greyhound in the Interstate Commerce Commission hearing that \$150,000.00 would be adequate working capital, and to the conclusion of the Interstate Commerce Commission that \$250,000.00 would provide adequate working capital. A verbatim transcript of the testimony of Pacific Greyhound's Vice-President before the California Public Utilities Commission was attached to the petition for rehearing (R. 85-7). The petition for rehearing also took exception to the finding that the proposed transfer would be consistent with the public interest, to the finding that the cash investment of \$250,000.00 in Golden Gate would provide it with adequate working capital, and to the conclusion that the proposed transaction was within the scope of Section 5. (R. 80).

On October 18, 1955, appellants filed a complaint in the United States District Court for the Northern District of California asking the Court to annul and set aside the order of the Interstate Commerce Commission (R. 1-7). The single ground on which the complaint challenged the validity of the order was that the proposed transactions did not come within the scope of Section 5 of the Interstate Commerce Act (R. 6-7).

Certain labor unions representing employees of Pacific Greyhound, who had appeared as protestants in the Interstate Commerce Commission proceeding, were joined with appellants as parties plaintiff in that action (R. 1-2). However, on the basis of an agreement reached between the labor unions and Pacific Greyhound and Golden Gate, the complaint was dismissed with prejudice as to the labor union plaintiffs on February 23, 1956 (R. 72-4). On that same day, while the Court was hearing arguments on appellees' motions for judgment on the pleadings and for dismissal of the complaint, appellants asked for permission to amend the complaint (R. 124, 117); and thereafter, on February 28, 1956, appellants filed a written motion for leave to amend the complaint, as well as the proposed amendment (R. 74-87). The motion to amend was argued on April 20, 1956 (R. 124). On May 3, 1957, the Court entered its judgment dismissing the complaint and denying the motion for leave to amend the complaint (R. 124-5), in accordance with the majority opinion of the Court dated April 12, 1957 (R. 111-18).

The proposed amendment to the complaint challenged the action of the Interstate Commerce Commission on two additional grounds, namely, (1) that the finding of the Interstate Commerce Commission that the proposed transactions were consistent with the public interest was not supported by substantial evidence, but was in fact contrary to the evidence for various reasons specified in the proposed amendment (R. 75-7), and (2) that the Interstate Commerce Commission abused its discretion in denying appellants' petition for rehearing and reconsideration, in view of the testimony regarding working capital already mentioned above which the Vice-President of Pacific Greyhound had given before the California Public Utilities Commission a few days after the Interstate Commerce Commission order had been issued (R. 77-8).

The proposed amendment alleged that there was no substantial evidence to support the finding of the Interstate Commerce Commission that the negotiation of employment contracts with the union had in the past been made difficult because the terms applicable to local drivers had been embraced in a single contract applicable to intercity drivers as well, and that such difficulty would be alleviated by the transfer of the local operations in question and the consequent separation of labor negotiations for the two classes of employees. The proposed amendment alleged that, on the contrary, and notwithstanding said finding, Pacific Greyhound and Golden Gate on February 21, 1956, entered into agreements with the unions providing that if the proposed transactions should be con-

summed the employees of Pacific Greyhound and Golden Gate would be covered by the same employment contracts, and that employees of Pacific Greyhound who transferred to Golden Gate would have the privilege to transfer back to Pacific Greyhound without loss of seniority (R. 76-77).

The proposed amendment also alleged that there was no substantial evidence to support a finding that Golden Gate would be financially able to perform the operations in question or that a cash investment of only \$250,000.00 would be sufficient to protect the public against discontinuance of the operations (R. 75); that there was no substantial evidence to support the finding or implied finding that the intrastate operations in question constitute a burden on the interstate operations of Pacific Greyhound, but, on the contrary, the evidence affirmatively showed that any losses on the operations in question have been fully offset by Pacific Greyhound's revenue from its other intrastate operations in California and that Pacific Greyhound's total intrastate operations in California have been conducted at rates which have returned a reasonable profit (R. 75-6); that there was no substantial evidence to support the implied finding that the California Public Utilities Commission has determined Pacific Greyhound's fares for the operations in question "in the light of Pacific's system-wide operations and revenues" (R. 76); that there was no substantial evidence to support the implied finding that the alleged managerial efficiencies which would result from the proposed transactions could not be

achieved as well by creating a separate operating division as by creating a separate subsidiary corporation (R. 77); and that there was no substantial evidence to support the finding that there has been a decline in Pacific Greyhound's long-haul traffic (R. 77).

With regard to the legal question as to the scope and meaning of Section 5(2) of the Interstate Commerce Act, the Court below held that the proposed transaction fell within that portion of Section 5(2)(a) which reads "or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise", and that for purposes of this section Golden Gate should be considered a carrier, even though it would not acquire carrier status until after the transaction had been consummated (R. 112-13).

With regard to the motion of appellants for permission to amend the complaint, the District Court held that, notwithstanding the liberal provisions for amendment contained in Rule 15(a) of the Federal Rules of Civil Procedure, the power to amend "should not be used to completely change the theory of the case after the case has been submitted to the Court on another theory without some showing of lack of knowledge, mistake or inadvertence on the part of the party seeking amendment, or some change of conditions of which that party had no knowledge or control" (R. 117-8). One judge dissented, on the ground that the public importance of the matter called for the exercise of the liberal policy of Rule 15(a) to permit a full judicial review of the entire matter (R. 122-3).

VI. SUMMARY OF ARGUMENT.

A. The scope of Section 5(2) of the Interstate Commerce Act.

The Congressional purpose in the enactment of Section 5(2) in 1940 was to facilitate mergers, consolidations, and unifications, as a means of rescuing the transportation industry from a serious economic situation. One-third of the railroad mileage was already in bankruptcy, and another third was teetering at the brink. The requirement in the 1920 Transportation Act that the Interstate Commerce Commission take the initiative in proposing consolidation plans had not borne fruit.

In this setting, Congress decided, in 1940, to encourage voluntary consolidations, subject to the approval of the Interstate Commerce Commission. To facilitate the consummation of such plans, Congress gave the Interstate Commerce Commission plenary jurisdiction, by providing in Section 5(11) that a transaction approved by the Interstate Commerce Commission under Section 5 could be put into effect without invoking any approval under state authority.

Although the legislative history shows that the Congressional concern went primarily to railroads, Section 5 was made applicable to motor and water carriers as well, since they were brought under the Transportation Act of 1940.

The purpose in dispensing with the need for state approval was obviously that of avoiding the delay and other complications which might result if approval had to be obtained from every state in which

each of the participating carriers operated. Section 5(2) was never intended to apply to the split-up of a single carrier. Its purpose was to strengthen by unification or merger, not to weaken by division. The language of the statute clearly shows this. In every instance it refers either to mergers and consolidations of carriers, or to acquisition of one carrier's properties by another, or to the bringing of two or more carriers under a common control. The legislative history likewise shows that Congress had consolidations and mergers in mind, not split-ups.

What Pacific Greyhound seeks to do here is to apply the statutory language in such a way as to accomplish the very opposite of the purpose for which Section 5(2) was enacted, namely, to amputate a very important but economically insecure branch of its service and to let it flounder alone without the sheltering protection which the healthy corporate body possesses by reason of its more profitable operations elsewhere in the state.

To permit the accomplishment of this objective, Pacific Greyhound contends, and the District Court and the Interstate Commerce Commission hold, that the hollow Golden Gate corporate shell should already be viewed as a "carrier", because it would be one if the transaction were consummated, and therefore that this is a situation in which one carrier, Pacific Greyhound, is acquiring control of another carrier, Golden Gate.

Section 5 should be interpreted in the light of the purposes which Congress sought to accomplish by it.

Except to carry out that purpose, the statute should not be construed so as to oust the jurisdiction of the state over operations which are almost completely intrastate."

B. The denial of the motion to amend.

Rule 15(a) of the Federal Rules of Civil Procedure specifically declares that the Courts shall be liberal in allowing amendments. The proposed amendment in this case did not abandon or modify the original ground on which the Interstate Commerce Commission order was challenged. It sought only to add further grounds of attack. It did not render void or useless any action previously taken by the parties or the Court. It was offered at the time of argument of the legal question which was the only point raised in the original complaint.

For all practical purposes, the situation is the same as if a plaintiff sought to amend his complaint after a ruling that he had not alleged facts sufficient to state a cause of action. Even before liberal rules of pleading like Rule 15(a) were adopted, the Courts almost automatically permitted amendments after sustaining a general demurrer.

There was no showing of prejudice to appellee, nor did the District Court base its denial on that ground. Rather, it held that the Court's power to allow amendment should not be used to permit the introduction of a completely new theory "without some showing of lack of knowledge, mistake or inadvertence . . . or some change of conditions. . . ."

This approach is a throwback to the long discredited idea that litigants should suffer from errors in judgment committed by their attorneys. It is not consistent with the modern view that a litigant should be permitted to present every basis of recovery or defense which he might have, subject only to the protection of the other party from unfair surprise or unreasonable delay.

The motion to amend in this case was made as a result of a reexamination of the matter after a settlement agreement had been reached between the unions and Pacific Greyhound and Golden Gate. This agreement was diametrically opposed to the contentions previously made by Pacific Greyhound and accepted by the Interstate Commerce Commission; and obviously it put a different light on the whole question of whether there was substantial evidence to support the public interest findings of the Interstate Commerce Commission. Reexamining the case in this new light, appellants' counsel concluded that they should have challenged the Interstate Commerce Commission order on the ground of insufficiency of the evidence as well as on the issue of jurisdiction.

The request to amend was made immediately upon the execution of the agreement with the unions, and at an early stage of the proceeding. The amendment would not have delayed final submission of the case for any long period of time, since it would have involved only the filing of the record before the Interstate Commerce Commission, the submission of the union contracts, and the presentation of argument.

It could hardly have delayed the case as long as the fourteen-month period during which the District Court had the motion to amend under consideration. In fact, had the amendment been allowed when offered, in February, 1956, the time which the Court devoted to argument of the motion to amend in April, 1956, could have been devoted to argument of the questions raised by the amendment, and in its decision a year later, in April, 1957, the Court could then have disposed of those questions on their merits and rendered a final decision on the entire action.

In these circumstances, the refusal to permit the amendment can hardly be supported on the ground of delay, and in fact the District Court did not rest its decision on that ground.

The furtherance of justice calls for full rather than partial litigation of disputes. Since no substantial hardship or prejudice to appellees was involved, the refusal to permit amendment was an abuse of discretion.

VII. ARGUMENT.

A. SECTION 5 RELATES TO CONSOLIDATIONS AND MERGERS, AND DOES NOT INCLUDE SPLIT-UPS.

This is the first case in which the Courts have been called upon to determine the applicability of Section 5(2) of the Interstate Commerce Act to split-ups of operations. The interpretation adopted by the lower Court ousts the jurisdiction of state regulatory commissions over the transfer of wholly intrastate motor carrier-operating rights issued by them, in situations

which fit neither the statutory language nor the economic problems which the statute was designed to meet.

1. The language of the statute does not support the lower Court's decision.

The plenary authority given to the Interstate Commerce Commission in Section 5 was never intended to embrace all transfers; rather, it was intended to apply only to transfers of operating rights in connection with the merger, consolidation, or unification of existing carriers—not to the split-up of an existing carrier into two or more subsidiaries, each of which obviously would possess only a portion of the economic resources of the mother unit.

The language of Section 5(2)(a)(i) of the Interstate Commerce Act is clear and unmistakable. It authorizes the Commission to give approval to five classes of transactions, as follows (*italics added*):

(1) "... for two or more *carriers* to consolidate or merge their properties or franchises ... into one corporation ... ;"

* * *

(2) "... for any *carrier* ... to purchase, lease, or contract to operate the properties ... of *another* ;"

* * *

(3) "... for any *carrier* ... to acquire control of *another* ... ;"

* * *

(4) "... for a person which is *not a carrier* to acquire control of two or more *carriers* ... ;"

* * *

(5) "... for a person which is *not a carrier* and which has control of one or more *carriers* to acquire control of another *carrier* . . ."

In each of the first three instances, *all* the parties to the transaction must be *carriers*, and the transaction is either a merger of two or more *carriers* or the acquisition of one *carrier's* property or operations by *another*. It is conceded that Golden Gate is not yet a carrier—a conclusion which is compelled by the definitions set forth in Sections 5(13) and 203(14). The proposed transfer, therefore, is not to a *carrier*, but only to an *expectant* or *would-be carrier*.

Only the fourth and fifth categories apply to non-carriers (which is Golden Gate's status), and then only if the non-carrier is to acquire control of another carrier or carriers. In this proceeding, the reverse situation exists, since the non-carrier (Golden Gate) is to be under the control of the carrier (Pacific Greyhound).

Thus, none of the provisions of Section 5(2) covers the split-up of a carrier's operations by transfer of a portion to a newly created corporation which is neither operating nor authorized to operate as a carrier.

That Congress was aware of the distinction between existing and prospective carriers is shown by Section 20a(1) of the Interstate Commerce Act, which provides (in connection with issuance of securities) that, as used in that section,

"... the term 'carrier' means a common carrier by railroad . . . or any corporation organized for

the purpose of engaging in transportation by railroad . . . (Italics added.)

2. The legislative history of Section 5 shows a Congressional policy of encouraging consolidation rather than subdivision of carrier operations.

The legislative history of Section 5(2) reveals even more emphatically that it was designed to provide encouragement to plans for consolidation and unification, and that Congress was not thinking of split-ups when it took the extraordinary step of ousting state jurisdiction over transactions falling within this section. The sweeping changes brought about by the Transportation Act of 1940 (54 Stat.L. 284) had been the subject of extensive study by Congressional committees and a Presidential group known as the Committee of Six, consisting of three railroad management and three railroad labor representatives. The nature and seriousness of the situation with which Congress was dealing are shown in the following excerpt from the report of the Senate Committee on Interstate Commerce (S.R. 433, 76th Congress, First Session, May 16, 1939, p. 1):

“The bill, S. 2009, represents a sound, realistic, and carefully considered approach to the solution of one of the most grave problems which confronts the people and the Congress of the United States. The importance of a sound transportation system is recognized by all. It is likewise apparent to even the unobserving that this nation cannot enjoy a sound transportation system if its most important carrier faces ruin and chaos. With one-third of the railroad mileage already

in bankruptcy or receivership courts and with another third tottering on the verge of bankruptcy, action must be taken to preserve not only the railroads but an adequate transportation system for this country."

Under the Transportation Act of 1920 (41 Stat. L. 456), the initiative in proposing consolidation plans had to come from the Interstate Commerce Commission. That approach had not proved fruitful, however, and as the railroad industry's financial condition steadily grew worse it finally became apparent, as this Court itself later observed, that

"waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements. The Transportation Act of 1940 relieved the Commission of formulating a nationwide plan of consolidation. Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of *merger or consolidation* if . . . the proposed transaction met with certain tests . . . in which case they should become effective regardless of state authority." (Italics added.)

Schwabacher v. United States, 334 U.S. 182 (1948).

The various House and Senate Reports all refer to Section 5 as a vehicle for expediting consolidations, mergers, unifications, and pooling arrangements in order to prevent sick carriers from dying and to enable weak carriers to strengthen each other. So urgent was the need, and so desperate the economic plight of the carriers, that Congress provided, in

Section 5(11), that a plan approved by the Interstate Commerce Commission could be put into effect without obtaining the approval which might otherwise be required from other federal agencies or from state agencies. See S.R. 433, *supra*; H.R. 1217, 76th Congress, First Session, July 18, 1939; H.R. 2016, 76th Congress, Third Session, April 26, 1940; H.R. 2832, 76th Congress, Third Session, August 7, 1940. See *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 315 (appendix) (1954), for a summary of the legislative history of Section 5.

In explaining the then-existing law, the Senate committee report (S.R. 433, *supra*, p. 28) pointed out that at that time Sections 5(2) and 5(3)(a) of the Interstate Commerce Act directed the Interstate Commerce Commission to adopt a plan for consolidation of railroads, and that Section 5(4)(b) provided that the Interstate Commerce Commission

“may approve mergers, consolidations, etc., with respect to railroads, upon the condition, among others, that they are in harmony with and in furtherance of the plan of consolidation adopted by the Commission.

“Section 213 of the Motor Carrier Act, dealing with motor carriers, contains no provisions corresponding to those in Section 5, dealing with railroads, with respect to a plan for consolidation.

“Section 49 of the bill makes no requirements with respect to a plan for consolidation to be made by the Interstate Commerce Commission. The elimination of this requirement is the most important change which would be accomplished

by the unification section of the bill. This change is recommended in the report of the Committee of Six (pp. 30-32), and has also been recommended by the Interstate Commerce Commission."

The report of the House Committee on Interstate and Foreign Commerce (H.R. 1217, 76th Congress, First Session, July 18, 1939) presented a substitute bill, in which Section 5 was amended in substantially its present form. That report includes the following explanations (pp. 6, 12):

"Consolidations, Pooling, and Control.

"The substitute bill proposes the repeal of existing provisions of the Interstate Commerce Act which require the Commission to take the initiative in drawing and proposing consolidation plans. The act would leave the carriers of various types free to propose consolidations but permit them to be made only with approval of the Commission and upon such conditions as it may find consistent with the public interest." (p. 6)

* * *

"Section 8. Pooling; Consolidations, Mergers, and acquisitions of Control in Case of Carriers by Railroad, Motor Vehicle, and Water.

"Section 8 amends section 5 of the present act—

"(1) By including in the pooling provision carriers by motor vehicle and water carrier. The present section deals only with agreements between carriers for the pooling of freight traffic and earnings of different and competing railroads. No change is made with respect to the findings that must be made by the Commission in each case as to the probable effect of such a

pooling arrangement upon service, operation, and competition. The assent of all carriers involved must be obtained as provided in the present law.

“(2) By repealing the provisions of existing law requiring the Commission to prepare and adopt a general consolidation plan.

“(3) By including in one section all the provisions of the Interstate Commerce Act with respect to consolidations, mergers, and acquisitions of control of all types of carriers. In addition to rail carriers and motor carriers, heretofore included under the old section 5 and section 213, water carriers are included, and express companies and forwarding companies are included for the first time. Section 213 is repealed. Certain special provisions therefrom are retained and included in the amended section 5.” (p. 12)

If Congress had intended the extraordinary procedure of Section 5, with a complete by-passing of other federal agencies and state agencies, to apply to split-ups, it would most certainly have mentioned split-ups in the committee reports, if not in the statute itself. The reports use the terms “pooling”, “consolidations”, “mergers”, and “unifications”, but nowhere is there any reference, directly or indirectly to a “split-up” or to any other term suggesting the subdivision of an existing carrier into two or more separate entities.

It is apparent why split-ups were not mentioned. The problem was what to do with a very sick industry—one-third of the carriers already in the bankruptcy Courts and another third at the threshold. The solu-

tion was to encourage the carriers to gain strength by combining. So great was the need to expedite plans of consolidation that Congress adopted the unusual procedure of freeing the carriers from any restraints of state or federal law except for the requirement of a finding by the Interstate Commerce Commission that the plan was consistent with the public interest.

To say that Congress intended this same short-cut procedure to apply to split-ups of a single carrier into two or more separate carriers is to ignore the situation which gave rise to Section 5. This case itself rather dramatically illustrates how the Congressional purpose would be prostituted if Section 5 is held applicable. An obviously weak carrier, Golden Gate, would be carved out of an economically strong one and would be sent out into the transportation world to flounder for itself and, if need be, to die in the bankruptcy Courts and leave the public without service. On the basis of its showing (R. 17), Golden Gate's operating loss in one year would use up almost all the \$250,000.00 cash capital and leave nothing at all for working capital.

If Golden Gate were presently conducting the operations in question, and if it were to go to the Interstate Commerce Commission with a plan for merger or consolidation with Pacific Greyhound, the proposal would fall squarely within the purpose and language of Section 5(2). But if the opposite is also true, then we must attribute to Congress the intent to provide special encouragement to a carrier to subdivide itself at the very time when Congress was pointedly placing

its faith in consolidations as the means of relieving carriers from critical economic distress.

3. **The states should not be deprived of authority over local operations in the absence of clear-cut Congressional authority to do so.**

The area of expropriation of state authority embodied in Section 5 should be defined narrowly, so as to permit accomplishment of the intended federal purpose without unnecessarily depriving the state of its jurisdiction. Since almost all of the operations involved here are intrastate, the state has the primary regulatory concern over them. The state Public Utilities Commission, having a much closer knowledge than the Interstate Commerce Commission of the nature and importance of these operations, should not be denied the power to make its determination as to where the public interest lies.

The difference between the state Public Utilities Commission's and the Interstate Commerce Commission's conclusions as to the public interest in this very situation is found in a comparison of this case with the decision of the state Public Utilities Commission in *Re Pacific Greyhound Lines and T. J. Manning*, 52 Cal. P.U.C. 2 (1952), in which the state Commission, after a six-day public hearing, refused to approve a transfer of Pacific Greyhound's local operations between San Francisco and Marin County to an operator who proposed to invest \$200,000.00 in working capital. The state Commission found this to be inadequate. Yet the Interstate Commerce Commission in this case found \$250,000.00 to be sufficient working

capital for an operation which included the Peninsula and Contra Costa operations, as well as Marin.

Perhaps the Interstate Commerce Commission was unduly concerned over the claim that Pacific Greyhound's interstate operations were being burdened by a loss in the local commute service. See, for example, the comments in the Interstate Commerce Commission's decision at R. 19-20, 25, and 28, where the Interstate Commerce Commission recites Pacific Greyhound's contention that the state Commission's rate policy "has required the subsidization of the services under these commutation fares by the revenue from the system-wide intercity operations" (R. 19) and that the separation should be approved "to alleviate the burden placed on interstate commerce through the California Commission's policy of requiring a subsidization of intrastate operations by revenues derived from interstate operations" (R. 25), and then states (R. 28):

"As contended by applicants, we may not properly overlook the burden on the interstate operations of Pacific [Greyhound] which the proposed transaction would alleviate."

Since the real purpose of this whole proposal is admittedly (R. 25) to circumvent the state commission's policies relating to the intrastate rates—a subject over which the Interstate Commerce Commission has no authority whatsoever in the case of motor carriers—the Court should be particularly careful to prevent the misuse of a statute enacted for an entirely different purpose.

Even where the Interstate Commerce Commission does have authority over intrastate rates, as in the case of railroads under Section 13(4) of the Interstate Commerce Act (U.S. Code, Title 49, Section 13(4)), this Court has carefully limited the invasion of the state's authority. In setting aside the order of the Interstate Commerce Commission increasing railroad rates for suburban commuter service in the Chicago area, this Court made the following statement of principle in the recent case of *Chicago, Milwaukee, St. P. & P. R. Co. v. State of Illinois*, U.S., 78 S.Ct. 304, 307-8 (1958):

"This case presents once again the problem of adjusting State and federal interests in the regulation of intrastate rates. These intrastate rates are primarily the State's concern and federal power is dominant 'only so far as necessary to alter rates which injuriously affect interstate transportation.' *State of North Carolina v. United States*, 325 U.S. 507, 511, 65 S.Ct. 1260, 1263, 89 L.Ed. 1760. Thus, whenever this federal power is exerted within what would otherwise be the domain of state power, the justification for its exercise must 'clearly appear.' " (Italics added.)

Similarly, the Court declared, in the same case (78 S.Ct. at 309):

"The limited and exceptional federal power asserted by § 13(4) over intrastate rates must be exercised with 'scrupulous regard for maintaining the [primary] power of the state in this field.' *State of North Carolina v. United States*, 325 U.S. 507, 511, 65 S.Ct. 1260, 1263, 89 L.Ed. 1760."

Even if the Interstate Commerce Commission had the direct authority to increase Pacific Greyhound's rates in this local service in order to alleviate a burden on interstate commerce, it could not take such action without first finding that the entire intrastate rate structure was inadequate. *Chicago, Milwaukee, St. P. & P. R. Co. v. State of Illinois, supra*. The Interstate Commerce Commission made no such finding, nor could it have. The California Commission has always allowed Pacific Greyhound a reasonable profit on its total intrastate operations, which amounted to a 7.1% rate of return in its most recent decision. *Re Pacific Greyhound Lines, et al.*, 55 Cal. P.U.C. 641, 656 (1957).

What the Interstate Commerce Commission could not do directly, because of insufficient legal power as well as lack of factual basis, it should not be permitted to do indirectly by strained elasticity in statutory interpretation.

The increasing complexity of our economy and the consequent interdependence of various parts of the country makes necessary and inevitable an enlargement of the federal government's authority over matters previously thought to be of local concern only. But federal jurisdiction is not to be extended willy-nilly and regardless of need. The governmental philosophy reflected in the judicial statements just quoted calls for a limitation of the Interstate Commerce Commission's authority under Section 5 short of the situation presented here.

The economic vice of the holding that Section 5 applies is that the state Public Utilities Commission, which has the direct regulatory responsibility for protecting the public interest with regard to substantially all of the operations involved, is completely by-passed, and the determination of public interest is made by a body (the Interstate Commerce Commission) which has regulatory responsibility for only a negligible portion of the operations. This anomalous result could be suffered if it were an inevitable by-product of the consolidation and merger rules which Congress deemed necessary when enacting Section 5. But the grant of plenary authority to the Interstate Commerce Commission goes only as far as the special measures which were authorized to strengthen weak carriers in a sick industry, and no further.

4. The exclusion of this transaction from Section 5 would not create an area of non-regulation.

There is no basis for the suggestion in the opinion of the Court below that if Section 5 should be held inapplicable, Pacific Greyhound would be "free to make substantial alterations in its corporate structure, to create subsidiaries to take over part of its existing operation, or perhaps to venture into new areas, without the necessity of seeking Commission approval" (R. 116). The Interstate Commerce Commission would clearly have jurisdiction over the transfer of interstate operating rights under Section 212(b), which provides that "Except as provided in Section 5" interstate motor carrier operating rights may be trans-

ferred pursuant to rules and regulations prescribed by the Commission.

Section 5 clearly applies to the transfer of an operating right from an existing carrier to an existing carrier. If Section 5 also applies to the transfer of an operating right from a carrier to a non-carrier, on the theory announced in this case that carrier status is to be determined as of the *consummation* of the transaction, Section 212(b) would be deprived of any significant meaning and would be limited entirely to motor carrier cases involving no more than 20 vehicles (as to which Section 5 is specifically made inapplicable by subsection (10)). Moreover, on this same principle, Section 312 of the Interstate Commerce Act (U.S. Code, Title 49, Section 912), requiring Commission approval of operating rights of water carriers, would have no meaning whatsoever. Such a construction is contrary to the Interstate Commerce Commission's own decision as to the interrelationship of Section 5 with Sections 212(b) and 312.

Thus, in *United States Lines Company (Panama Pacific Line) Certificate Transfer*, 260 I.C.C. 355 (1944), the Commission held that Section 312, and not Section 5, was applicable to a transfer of a water carrier certificate from a carrier to a new corporation resulting from the merger of the carrier and its parent.

In *Atwood's Transport Line—Lease—John A. Clarke*, 52 M.C.C. 97 (1950), the Commission itself emphasized that Section 5 is concerned primarily

with mergers. In denying a motion by an intervening Greyhound carrier to revoke a certificate and cancel a lease of the operation, the Commission said (52 M.C.C. at 107-8, italics added):

"The national transportation policy was not intended to eliminate the distinction between sections 5 and 212(b), as specifically set forth in those separate sections of the act. It was only necessary that the national transportation policy be kept in mind when the Commission prescribed the rules and regulations governing transfers of certificates and permits, its sole power under Section 212(b). *Section 5 is principally concerned with the bringing of two or more carriers under control or management in a common interest.* For those small carriers desiring to effect the transfer of a certificate or permit from one to the other, a specific exemption was provided in section 5(10), and other transfers of a certificate from a carrier to a person, not a carrier and not affiliated with a carrier, are not subject to Section 5. The intent of the Congress obviously was to provide a means whereby such transfers could be effected easily and without delay under such rules as the Commission deemed appropriate."

* * *

"It is for Congress to enact legislation, and it has seen fit to draw a definite line of distinction between transfers of certificates not involved in a transaction which is subject to section 5, and the control of two or more carriers of sufficient size to be subject to section 5, where the transfer of a certificate may be involved."

Under well-established rules of statutory construction, Sections 5, 212(b), and 312 should be construed

in such a way as to give effect to each, and render neither "superfluous, void, or insignificant." And that cannot be done under the interpretation adopted by the lower Court.

Washington Market Co. v. Hoffman, 101 U.S. 112, 116 (1879);

Ex Parte The Public National Bank of New York, 78 U.S. 101, 104 (1928);

D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932).

It is to be noted that when Pacific Greyhound, Golden Gate, and the Greyhound Corporation filed their application with the Commission for transfer of the operating rights, they prayed for authorization under Section 5 *or under Section 212(b)* if Section 5 were deemed inapplicable.¹ Had the application been processed under Section 212(b) and transfer only of the interstate rights been authorized, we could not challenge the jurisdiction of the Commission; but in that event no transfer of the intrastate rights (which as a practical matter constitute almost the entire operation) could be made without first getting the approval of the state Public Utilities Commission.

¹The application is not a part of the record on appeal, but the prayer thereof reads as follows:

"WHEREFORE, Applicants pray that the Interstate Commerce Commission enter an order approving and authorizing such transaction, upon the terms and conditions, and with such modifications as it shall find to be just and reasonable; or, if it is found that the transaction is not one subject to section 5, but that it involves the transfer of a certificate or permit properly for consideration under the provisions of section 212(b), that it be accepted and determined under those provisions and the rules and regulations promulgated thereunder."

The lower Court's reliance on the administrative interpretation placed on Section 5 by the Interstate Commerce Commission overlooks the Commission's decisions just cited and attributes too much weight to several small, uncontested cases in which the law was stretched as a practical means of reaching results which were not being opposed. In the first of these, *Columbia Motor Service Co.—Purchase—Columbia Terminals Co.*, 35 M.C.C. 531 (1940), a single carrier operating in Missouri in both interstate and intrastate commerce was confronted with the problem arising from a holding of the Missouri Public Service Commission that a single entity could not operate as both a common carrier and a contract carrier. It sought to extricate itself from repeated arrests of its drivers and "to obviate continuing conflict with the Missouri Commission" by seeking a split-up authorization from the Interstate Commerce Commission under then Section 213 of the Interstate Commerce Act (which contained language similar to present Section 5 and was repealed when motor carriers were placed under Section 5 by the 1940 Act). Although no one opposed the application, the Interstate Commerce Commission expressed considerable doubt about the proposal, and authorized it only because it appeared to afford "the only practical solution for elimination of continued conflict with the Missouri authorities". (35 M.C.C. at 535.)

Similarly, there were no protestants in *Consolidated Freightways Inc.—Control—Consolidated Convooy Co.*, 36 M.C.C. 358 (1941), and *Takin—Purchase—Takin*

Bros. Freight Line, Inc., 37 M.C.C. 626 (1941); and there was not even a public hearing in *Gehlhaus and Hollobinko—Control*, 60 M.C.C. 167 (1954). Administrative decisions given under such circumstances hardly seem an appropriate foundation for an interpretation which would drastically curtail state authority over intrastate operations, particularly when they are different in principle from other decisions of the same administrative agency, as already indicated.

The holding of the lower Court is not consistent with the views expressed in *General Transportation Co., et al. v. United States*, 65 F.Supp. 981, 984 (D.C. Mass. 1946), which involved a transfer of a common carrier certificate from one carrier to another carrier. The order of the Interstate Commerce Commission authorizing the transfer under Section 5(2) was attacked on appeal on the ground that the transferor carrier had previously ceased operations and that Section 5(2) applied only to carriers actually conducting carrier operations. In rejecting this argument, the special three-judge Court said that the contention had merit except for the fact that, under other provisions of the Act, the holder of a common carrier certificate was by reason of that fact alone a carrier regardless of whether he was still operating. If the status of "carrier" requires either the possession of an unrevoked certificate or the conduct of actual operations, Golden Gate cannot qualify on either basis.

5. **Cases under the Civil Aeronautics Act have no applicability to Section 5.**

The lower Court leaned heavily (R. 115-6) on the construction placed by the Second Circuit on Section 408 of the Civil Aeronautics Act (U.S. Code, Title 49, Section 488), which at first blush seems to parallel Section 5(2) of the Interstate Commerce Act. *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F.2d 810 (CA 2, 1941).

There are significant differences between air and surface transportation, however, which must be considered in interpreting the respective statutes. Most striking of all is the difference in legislative philosophy in the area of monopoly and competition. The Congressional policy of promoting unification and lessening competition as to surface carriers, as clearly shown by the legislative history of the Transportation Act of 1940, is in sharp contrast with the Congressional fear that monopoly and lack of competition would retard the growth of air transportation. See Federal Aviation Commission Report, Senate Document 15, 74th Congress, 1st Session, January 30, 1935, and particularly Recommendations 9 and 13 (pp. 10-11), and the discussion thereof (pp. 61-2, 69-71, 245), for strong policy statements regarding the need to restrict common control of air carriers and of air carriers by other interests, through holding companies, interlocking interests, or other devices.

Similar views are expressed in the floor debates. See Congressional Record, Senate, May 12, 1938, 75th Congress, 3rd Session, pp. 6728-32, for the statements

of the authors of the two pending civil aeronautics bills, Senators Truman and McCarran, that their respective bills would prevent monopolies and restraints on competition and would require the Board to reject mergers and consolidations which would raise the danger of monopoly or restraint of competition. In these debates, both authors agreed that their bills should be amended by eliminating the qualifying words "unduly" and "unreasonably" in the provisions which, as then written, prohibited mergers which would "unduly" restrain competition or "unreasonably" jeopardize other carriers.

This basic difference in the approach which Congress applied on the one hand to a well-developed industry suffering from excessive competition and wasteful duplication, and on the other hand to an infant industry greatly in need of the stimulating effects of competition, is reflected in the statutory language itself. Section 5(2)(a) of the Interstate Commerce Act, designed to encourage consolidations, commences with words of invitation:

"It shall be lawful, with the approval and authorization of the Commission . . ."

Section 408(a) of the Civil Aeronautics Act reflects the opposite policy in the negative tone of its introductory clause:

"It shall be unlawful, unless approved by order of the Board . . ."

The situation in the *Pan American Airways Co.* case, *supra*, was control of an applicant for an air

carrier certificate by a water carrier—one of the very types of monopolistic controls which Congress specifically wanted the Board to restrict and closely regulate. To hold that Congress had not intended to give the Board jurisdiction over such a situation would have done violence to the pointed legislative history mentioned above.

Moreover, the consolidation and merger provisions of Section 408 specifically provide in subsection (b), U. S. Code, Title 49, Section 488(b), that

“... if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier. . . .”

This language clearly shows an intent to treat an applicant who is not yet an air carrier as if it were already an air carrier *if it is controlled by a surface carrier*. Obviously, such a proviso would be unnecessary if carrier status were to be determined as of the consummation of the transaction. Congress unquestionably knew the difference between an *existing* and a *would-be* carrier. There is no comparable provision in Section 5 of the Interstate Commerce Act.

Finally, we have the inherent differences in the characteristics of air and surface transportation. Air carriage is more appropriate for long than for short distances, and of necessity is predominantly interstate rather than intrastate in nature. The lag in state regulation of air carriers, even in the larger states, is

a reflection of this fact. The interplay of state and federal regulation does not, therefore, present the same considerations in air transportation as are involved in the regulation of motor carriers. The area of exclusion of state authority over transfers of operating rights could well be larger as to air carriers than as to motor carriers consistently with the policy of preserving as much local authority as possible over local operations.

**B. REFUSAL TO ALLOW THE PROPOSED AMENDMENT
WAS AN ABUSE OF DISCRETION.**

1. The amendment raised substantial questions of public importance.

The proposed amendment to the complaint challenges the Interstate Commerce Commission's finding that the split-off of the local operations is in the public interest. The importance of this question is apparent. The service is essential to a large segment of the commuting public which works in San Francisco and lives in the suburbs. The suburban areas have a combined population of more than 400,000 (R. 11). The annual revenue exceeds \$3,500,000.00 (R. 15-16). The Marin County portion of this service was assumed by Pacific Greyhound as a means of relieving an affiliated carrier then performing the service. See dissenting opinion of the Court below, R. 120-2, which includes a lengthy excerpt from the decision of the state commission (*Re Pacific Greyhound Lines*, 42 Op. Order of Railroad Commission of the State of California 661, 668-9).

The grounds on which appellant sought to attack the Interstate Commerce Commission's findings and orders are set out at length in the proposed amendment (R. 75-8). There is no suggestion in the opinion of the lower Court that these are not substantial grounds, nor could such a contention validly be made. If the allegations of the amendment are true, the public has not been adequately protected against discontinuance of the operations, and Pacific Greyhound has obtained the Commission's authority to escape its obligations to the public on a record which contained insufficient factual support for such a result and which included representations to the Commission directly contrary to Pacific Greyhound's subsequent conduct.²

This is certainly a situation which should be determined by judicial review in the absence of compelling considerations for denial of review.

2. The lower Court failed to give effect to the liberal policy of amendment required by Rule 15.

The lower Court's denial of the motion to amend was based on the principle that an amendment which changes the theory of the case after it has been submitted on another theory should be allowed only on a showing of "lack of knowledge, mistake or inadvertence on the part of the party seeking amendment, or some change of conditions of which that party had no knowledge or control" (R. 118).

²Including specifically the subsequent inconsistent testimony of Pacific Greyhound's Vice-President as to working capital requirements and the negotiation of a joint labor contract coupled with the unions' agreement to drop their appeal from the order, as related in the statement of the case section of this Brief.

It may be observed, in view of this description of the posture of the case, that the amendment simply added another theory to the case but did not in any way alter or abandon the original theory. Furthermore, the only judicial proceeding which had occurred was argument of the legal question of jurisdiction which the complaint raised. Nothing had occurred which the amendment would have rendered immaterial or even less important, nor had the time of the Court or of the parties been imposed upon. On the contrary, the jurisdictional question would have retained its full significance, and would have called for exactly the same attention by the parties and the same consideration by the Court under the complaint as amended as under the original complaint.

This is not, therefore, analogous to cases in which there has been a trial on factual issues, and thereafter an effort is made to raise new factual issues which might require further testimony from the same or additional witnesses, with consequent hardship to witnesses and imposition on the time of the court and the other parties.

Rather, this case is like the situation which frequently arises when a Court holds that the allegations of a complaint are insufficient to state a cause of action. Amendment is allowed as matter of course in such situations. In fact, the exact issue before the Court, when the motion to amend was made, was whether the complaint stated a cause of action, since the only question it raised was the jurisdiction of the Interstate Commerce Commission under Section 5.

To condition the right to amend under these circumstances on a showing of mistake, inadvertence, or excusable neglect is contrary to the specific requirement in Rule 15(a) of the Federal Rules of Civil Procedure that "leave shall be freely given when justice so requires."

The criteria applied by the lower Court are those which customarily govern relief from default judgments. See, for example, Rule 60(b) of the Federal Rules of Civil Procedure, and Section 473 of the California Code of Civil Procedure. The difference between the strict criteria for relief from a final judgment and the liberal policy governing amendments precludes the application of the mistake and inadvertence philosophy as the standard governing the allowance of amendments. While these same factors of mistake and inadvertence may properly be weighed by the Court in balancing the equities, they do not furnish a basis for denial of amendment in the absence of strong affirmative reasons for refusing leave to amend.

A mere recital of the chronology of this case shows that appellees could not have suffered from any delay in the presentation of the additional grounds alleged in the amendment. The complaint was filed on October 18, 1955 (R. 1). The United States and the Interstate Commerce Commission filed their joint answer on December 15, 1955 (R. 44). The intervenor appellees filed their notice of motion to intervene on December 29, 1955 (R. 49), which motion was granted without opposition on January 9, 1956 (R. 51). The

order designating the three-judge Court was entered on January 12, 1956 (R. 50-51). On January 23, 1956, the intervenors filed their notice of motion to dismiss the complaint for failure to state a claim upon which relief can be granted (R. 67-8); on February 2, 1956, the United States and the Interstate Commerce Commission filed a notice of motion for judgment on the pleadings (R. 69); and on February 17, 1956, appellants as well as the labor unions who were then still parties plaintiff filed a notice of motion for judgment on the pleadings (R. 70-1).

All three motions raised exactly the same question, namely, did Section 5(2) apply? They were all noticed for February 23, 1956, and were argued on that day. In the meantime, on February 21, 1956, the labor unions who had originally joined appellants as plaintiffs had stipulated with appellees for a dismissal with prejudice as to them (R. 72-3), and the order of dismissal was presented to the Court and signed and filed on February 23, 1956 (R. 73-4). As previously noted, the proposed amendment to the complaint alleges that on February 21, 1956, Pacific Greyhound and Golden Gate entered into a joint contract with the labor unions (R. 76-7).

In view of the joint labor union contracts with both Pacific Greyhound and Golden Gate and the contemporaneous withdrawal of the labor unions from the action, appellants, at the time of argument of said motions on February 23, 1956, asked permission to amend the complaint (R. 117), and on February 28, 1956, filed their written motion to amend with the proposed amendment (R. 74-8).

It may be noted here that, if the proposed amendment had been included in the original complaint, the question of the applicability of Section 5 would still have been before the Court on appellants' motion for judgment on the pleadings and, whether argued on February 23, 1956, or later, would have required the same exhaustive briefing and argument which it received.

Appellants' motion to amend was opposed by all appellees (R. 92-111) and was argued orally on April 20, 1956 (R. 124).

Thus, the motion to amend was made less than two months after the intervention of the intervenors, who themselves had waited more than two months before requesting intervention and had waited another month before filing their motion to dismiss. Had the motion to amend been granted when made, the entire matter could have been argued and submitted at the hearing on April 20, 1956, which, instead, was devoted to arguing the motion. The only additional material to be presented to the Court under the amendment would have been the record before the Interstate Commerce Commission and the labor contracts.

Thereafter, the lower Court waited almost a year before announcing its decision on April 12, 1957 (R. 111-18), and a reading of the majority opinion suggests rather strongly that this lengthy consideration was related primarily to the question of the applicability of Section 5, not to the motion to amend. (Obviously, if the motion to amend presented an issue so troublesome as to require a year to decide, that factor

alone would have called for allowing rather than rejecting the amendment, in view of the liberal policy in favor of amendments set out in Rule 15(a).

It is clear, therefore, that the question of timeliness cannot justify the Court's refusal to permit amendment, nor did the lower Court place its denial on that ground. It should be noted, however, that even if timeliness were involved, there would still be no basis for the denial in the absence of prejudice to appellees.

Doehler Metal Furniture Co. v. United States,
149 F.2d 130 (CA 2, 1945);

Markert v. Swift & Co., Inc., 173 F.2d 517
(CA 2, 1949);

Maryland Casualty Co. v. Rickenbaker, 146 F.
2d 751 (CA 4, 1944);

Atlantic Coast Line R. Co. v. Mims, 199 F.2d
583 (CA 5, 1952);

McDowall v. Orr Felt & Blanket Co., 146 F.2d
136 (CA 6, 1944);

Rogers v. Girard Trust Co., 159 F.2d 239 (CA
6, 1947);

Lloyd v. United Liquors Corp., 203 F.2d 789
(CA 6, 1953);

Armstrong Cork Co. v. Patterson-Sargent Co.,
10 F.R.D. 534 (D.C. Ohio, 1950).

The case of *Lloyd v. United Liquors Corp.*, *supra*, is typical. Plaintiff's counsel had stated, on argument of motions for dismissal and summary judgment in an anti-trust treble-damage action, that he wanted to reserve the right to amend. Thereafter, the Court granted the defense motions, and refused plaintiff per-

mission to amend the complaint. In reversing the order denying leave to amend, the Appellate Court emphasized the liberal policy of permitting amendments. Answering the argument that amendment of the complaint would have delayed final disposition of the case by the trial Court, the Appellate Court quoted with approval (203 F.2d at 793) the following language from *Doehler Metal Furniture Co. v. United States*, *supra*, at 135:

“But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay.”

In the *Maryland Casualty Co.* case, *supra*, the trial Court had denied leave to amend the complaint during the trial, for the reason that, with proper preparation of the case, plaintiff could have proposed the amendment before the trial. In rejecting this as a ground for denial, and holding that the amendment should have been allowed, the Appellate Court said (146 F.2d at 753):

“The more important question for the court’s consideration, at the time that the motion to amend was made, was the effect which it would have, if granted, upon the rights of the parties and the proper disposition of the business of the court.”

Similarly, in *McDowall v. Orr Felt & Blanket Co.*, *supra*, where the trial Court had refused leave to amend on the ground that the issues had been settled

at a previously-held pre-trial conference, the Appellate Court reversed with the following observation (146 F.2d at 137):

"The only question which confronts us is whether appellant should have been permitted to file his amended complaint, and it is here unnecessary to discuss any legal or factual questions with regard to the content of the proposed amended pleading. Rule 15 of the Federal Rules of Civil Procedure provides that, in the circumstances disclosed in this case, a party may amend his pleading only by leave of court . . . and leave shall be freely given when justice so requires." Subsection (a). The rule continues, confirms, and emphasizes the practice in effect prior to its adoption, in which liberality in amendment was encouraged and favored, where no prejudice or disadvantage was suffered by the opposing side."

The majority opinion of the lower Court makes no reference to any prejudice or hardship which the amendment would have imposed on appellees, nor did any of the appellees attempt to justify the denial on that ground in their motions to affirm filed with this Court prior to the order noting probable jurisdiction. The basis for the ruling advanced in the majority opinion and urged by appellees is that counsel for appellants concededly had considered the advisability of challenging the sufficiency of the evidence before filing their complaint and had decided not to do so, and that the subsequent effort to raise this issue was not, therefore, based on "lack of knowledge, mistake or inadvertence . . . or some change of conditions . . ." (R. 118.)

Such a rule would penalize a litigant for an error in judgment of his attorney. The liberal policy of Rule 15(a) precludes such a result. If counsel for one of the parties determines, on further evaluation of the case, that his client has another ground of relief, amendment should be allowed unless doing so would impose such hardship or prejudice on the other side as to overbalance the desirability of a full judicial hearing on all issues desired to be presented. Justice is not furthered by delimiting the issues without good reason.

The rule announced by the lower Court puts such a premium on the original pleadings as to force attorneys to inject into their pleadings every possible factual and legal theory of relief, regardless of the attorney's judgment at that time as to the validity of such theory. The "shotgun approach" of pleading a multiplicity of issues "for good measure rather than for good reason" is one which the Courts have sought to discourage rather than promote. See, for example, *Application of House*, 144 F.Supp. 95, 99 (N.D. Calif. 1956).

It is not purely coincidental that counsel for appellants asked leave to amend at the very time that appellees advised the Court of the agreement which Pacific Greyhound and Golden Gate had just negotiated with the labor unions. One of the important factors relied upon by the Interstate Commerce Commission in its determination of public interest was the claim of Pacific Greyhound that its labor-management relationships had been made especially diffi-

cult by the necessity of negotiating terms applicable to both local and long-line drivers in a single labor agreement (R. 21). After having persuaded the Interstate Commerce Commission to accept this argument, even though "strongly disputed by the union" (R. 21), Pacific Greyhound and Golden Gate thought so little of it as to enter jointly into agreements with the unions which, as alleged in the proposed amendment, provide that, if the proposed transaction is consummated, employees of Pacific Greyhound Lines and Golden Gate Transit Lines will be covered by the same employment contracts, and employees of Pacific Greyhound Lines who transfer to Golden Gate Transit Lines will have the privilege to transfer back to Pacific Greyhound Lines without loss of seniority (R. 76-7).

Conduct so startlingly contrary to the contentions which Pacific Greyhound had successfully urged before the Interstate Commerce Commission called for a re-evaluation of the entire question of whether there really was substantial evidence to support the public interest findings of the Interstate Commerce Commission. On such reconsideration, counsel for appellants concluded that they should urge the Court to review the sufficiency of the evidence and the propriety of the Interstate Commerce Commission's findings and of its order denying rehearing and reconsideration, as an additional ground for setting aside the order of the Commission.

The reluctance of the Courts to disturb discretionary rulings of administrative agencies is a guidepost

to litigants to refrain from asking for judicial review unless the abuse of administrative discretion or the lack of evidence is clearly apparent. The litigant must leave the determination of this question to his attorney, who, in turn, must rely heavily on his judgment. When review of the case later leads the attorney to a different conclusion, his client's right to raise the issue should be restricted only by considerations of fairness to both sides, and not by concepts of inadvertence, ignorance, or neglect.

To the extent that Pacific Greyhound might claim that even the brief delay which allowance of the amendment might have involved would have caused financial hardship with respect to its rate structure, the complete answer is that, under the latest fare increases authorized by the California Public Utilities Commission, Pacific Greyhound is allowed a generous rate of return of 7.1% on its rate base in its total California intrastate operations. *Re Pacific Greyhound Lines, et al.*, 55 Cal. P.U.C. 641, 656 (1957). Even before the motion to amend had been argued, Pacific Greyhound received a fare increase in the bulk of the local operations involved in this case, as stated in footnote 4 of the dissenting opinion (R. 123). See *Re Pacific Greyhound Lines*, 54 Cal. P.U.C. 675 (March 27, 1956), which authorized a substantial increase in fares in the Peninsula and Marin operations.

VIII. CONCLUSION.

The judgment of the lower Court should be vacated and the case should be remanded for entry of a judgment setting aside the order of the Interstate Commerce Commission; or, in the alternative, the lower Court should be directed to grant appellants' motion to amend their complaint and conduct such further proceedings as might be appropriate.

Dated, March 4, 1958.

Respectfully submitted,

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Of Counsel.

Office - Supreme Court, U.S.
FILED

MAR 22 1958

JOHN T. FEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA COSTA,
MARIN COUNTY FEDERATION OF COMMUTERS
CLUBS, and CONTRA COSTA COUNTY COM-
MUTERS ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION, GOLDEN GATE TRANSIT
LINES, PACIFIC GREYHOUND LINES, and THE
GREYHOUND CORPORATION,

Appellees.

Appeal from Judgment, of the United States District Court
for the Northern District of California,
Southern Division.

SUPPLEMENTAL BRIEF OF APPELLANTS.

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GREYHOUND CORPORATION,

Appellees.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Southern Division.

SUPPLEMENTAL BRIEF OF APPELLANTS.

After the filing of the brief of appellants herein on
March 6, 1958, counsel for appellants learned of an

unpublished decision of the Public Service Commission of the State of Missouri dated April 29, 1940, which relates to *Columbia Motor Service Co.—Purchase—Columbia Terminals Co.*, 35 M.C.C. 531 (1940), cited and discussed at page 38 of brief of appellants.

The unpublished decision is set out in the appendix hereto, and a certified copy thereof is being filed with the clerk simultaneously with the filing of this supplemental brief.¹

As the decision of the Missouri Public Service Commission shows, the transfer of the intrastate operating rights in the *Columbia Motor Service Co.* case, *supra*, was consummated pursuant to the specific approval of the State Commission, upon the application of the carriers involved, *and not under the authority of the Interstate Commerce Commission order.*

It is clear, therefore, that the parties to that proceeding did not claim that the plenary and exclusive authority of the Interstate Commerce Commission under Section 213 (the predecessor of Section 5 of the Interstate Commerce Act) extended to the split-up of Columbia Terminals Company's intrastate operating rights.

To point to the *Columbia Motor Service* case as support for the construction that the Interstate Commerce Commission has exclusive jurisdiction over the transfer of intrastate rights in a split-up is to at-

¹On March 11, 1958, counsel for appellants furnished counsel for all appellees with a copy of said decision and notified them of his intention to call the same to the attention of the Court.

tribute to that decision greater scope and meaning than the parties themselves gave to it at the time.

Dated, March 19, 1958.

Respectfully submitted,

SPURGEON AVAKIAN,

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Of Counsel.

(Appendix Follows.)

Appendix

State of Missouri Public Service Commission

At a session of the Public Service Commission held at its office in Jefferson City on the 29th day of April, 1940.

In the matter of the application for transfer of Contract Hauler's Permit No. T-228-X from Columbia Terminals Company to Columbia Motor Service Company.

Case No.
T-7335

ORDER

This cause comes now before the Commission upon the joint application of Columbia Terminals Company of St. Louis, Missouri, and Columbia Motor Service Company of St. Louis, Missouri, for the transfer of Contract Hauler's Permit No. T-228-X from Columbia Terminals Company to Columbia Motor Service Company.

The Commission finds that Columbia Terminals Company has sold the portion of its business, rights and assets by which it has carried on contract hauler operations to Columbia Motor Service Company.

Columbia Motor Service Company, holder of contract Hauler's Permit No. T-7279-X, is in all respects qualified to conduct the business of a contract hauler, and the Commission is therefore of the opinion that the transfer should be granted.

It is, therefore,

Ordered: 1. That Contract Hauler's Permit No. T-228-X be retried and that all authority granted thereunder be and is hereby transferred from Columbia Terminals Company to Columbia Motor Service Company of 1422 North 10th Street, St. Louis, Missouri, and merged under Contract Hauler's Permit No. T-7279-X; the authority transferred being as follows:

Contract Hauler, intrastate, irregular.

Route: St. Louis to and from all points in Southeast Missouri and in St. Charles County.

Ordered: 2. That the said Columbia Motor Service Company shall, on or before the effective date of this order, publish, post and file with this Commission, proper adoption notices or rate schedule, providing for the continuation of the rates, charges, rules and regulations now published and filed with this Commission.

Ordered: 3. That this order shall be effective ten days from this date and that the Secretary of this Commission shall serve certified copies of same on all interested parties.

(Seal)

By The Commission

/s/

Edgar M. Eagan

Secretary

James, Chr., Boyer, Ferguson,
Wilson, Francis, CC. Concur

State of Missouri,
Office of the Public Service Commission.

I have compared the preceding copy with the original on file in this office, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and seal of the Public Service Commission, at Jefferson City, this 13th day of March, 1958.

Patricia Nacy,
Secretary.

(Seal)

SEP 27 1957

In the Supreme Court of the T. FEY, Clerk

United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA COSTA,
MARIN COUNTY FEDERATION OF COMMUTERS
CLUBS, and CONTRA COSTA COUNTY COM-
MUTERS ASSOCIATION,

Appellants,

VS.

UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION, GOLDEN GATE TRANSIT
LINES, PACIFIC GREYHOUND LINES, and THE
GREYHOUND CORPORATION,

Appellees.

Appeal from Judgment of the United States District Court for the
Northern District of California, Southern Division

Motion of Appellees, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, to Affirm Judgment and Brief in Support of Motion

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Dated September 25, 1957

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA COSTA,
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UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION, GOLDEN GATE TRANSIT
LINES, PACIFIC GREYHOUND LINES, and THE
GREYHOUND CORPORATION,

Appellees.

Appeal from Judgment of the United States District Court for the
Northern District of California, Southern Division

Motion of Appellees, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, to Affirm Judgment

Appellees Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation move the Court to affirm the judgment below, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, on the ground that it is manifest that the questions on which the decision of the cause herein depends are so unsubstantial as not to need further argument.

Brief in Support of Motion to Affirm Judgment

THE ISSUES

The issues presented by this appeal are:

1. Whether the Interstate Commerce Commission and the court below correctly decided that the Commission has exclusive and plenary jurisdiction under Section 5 of the Interstate Commerce Act to authorize a transaction under which a common carrier by motor vehicle would acquire control of a newly organized motor carrier to whom certain interstate and intrastate operating rights and properties would be concurrently transferred by the corporation acquiring such control.
2. Whether the court below abused its discretion in denying plaintiffs leave to amend their complaint where the motion was tardily filed after the only issue raised by the complaint had been heard and where the failure to include the additional issues in the original complaint was not due to inadvertence or oversight.

During a period of more than fifteen years, in an unbroken line of decisions, the Interstate Commerce Commission has exercised its jurisdiction under Section 5 of the Interstate Commerce Act to authorize comparable transactions. The Commission's authority is plainly declared by statutory provision and supported, without exception, by all reported authority.

STATEMENT OF THE CASE

This is a direct appeal from a final judgment entered on May 3, 1957 by a district court of three judges specially constituted pursuant to 28 U.S.C. §§ 2284 and 2325, dismissing appellants' complaint, which sought to set aside and annul an order of the Interstate Commerce Commission, and denying appellants' motion for leave to amend the complaint.

On February 8, 1954, Pacific Greyhound Lines, Golden Gate Transit Lines and The Greyhound Corporation (herein called "Pacific", "Golden Gate" and "Greyhound", respectively) filed joint applications with the Interstate Commerce Commission (herein called "the Commission") for an appropriate order, under Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5 (herein called "the Act"), authorizing a transaction under which (1) Pacific would acquire control of Golden Gate through ownership of capital stock; (2) Pacific would transfer certain properties and operating rights to Golden Gate; (3) Greyhound would acquire control of Golden Gate through Pacific; and (4) by a separate application as a matter directly related to the applications under Section 5, Pacific would continue operations over portions of the routes to be transferred to Golden Gate. (The foregoing requested authorization will herein be called "the transaction".)

When the joint applications were filed Pacific was a common carrier of passengers by motor vehicle in both interstate and intrastate commerce in the seven western states. The transaction described in footnote 2 of the Commission's report (Appellants' Statement as to Jurisdiction, Appendix D, p. 23, herein called "juris. st., App.") has now been consummated, Pacific has been merged into Greyhound and Pacific's operations are presently being conducted by Greyhound.* Golden Gate is a newly organized corporation authorized by its articles to engage in the transportation of passengers by motor vehicle. Golden Gate is not presently an operating common carrier, but it will become such upon consummation of the transaction authorized by the Commission's order. The operating rights to be

*Under the law of the State of Delaware which is applicable to that merger, pending actions by or against the merged corporation may proceed as if the merger had not taken place.

transferred to Golden Gate include both intrastate and interstate services, and comprehend local operations for distances up to 25 or 30 miles in the San Francisco Bay area, styled by the Commission "commuter operations". (Juris. st., App. D, p. 26)

At the public hearing on these applications, appellants County of Marin, County of Contra Costa, Marin County Federation of Commuter Clubs and Contra Costa County Commuters Association, plaintiffs below, appeared to oppose the applications. The applications were also opposed by representatives of Pacific's employees (herein called "the Union") who were plaintiffs below.* Following the public hearing briefs were filed, an Examiner's proposed report was issued, exceptions thereto were filed and oral argument was had before the full Commission. By its report and order dated July 6, 1955, 65 M.C.C. 347 (juris. st., App. D), the Commission found *inter alia* that the transaction was within the scope of Section 5(2)(a) of the Act, that the transaction was consistent with the public interest, and that an appropriate order should be entered approving and authorizing the transaction. Appellants' (protestants before the Commission) petition for rehearing and reconsideration was denied.†

On October 18, 1955, plaintiffs (appellants herein) commenced Civil Action No. 34985 to annul this order of the Commission. The complaint tendered but a single issue of law—whether the Commission exceeded its jurisdiction

*By stipulation and order of court prior to entry of judgment, Civil Action No. 34985 and the complaint on file therein were dismissed as to the Union.

†The Commission's order originally provided that unless the transaction was consummated within 180 days from the effective date of the order the authorization would be terminated. This period has from time to time been extended, the current expiration date being January 15, 1958.

in approving and authorizing the transaction. Pacific, Golden Gate and Greyhound intervened as defendants, and, after the statutory three-judge district court was convened, moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The United States and the Commission, after answering, jointly moved for judgment on the pleadings; appellants likewise moved for judgment on the pleadings. During final argument on these motions appellants made their initial request for permission to amend the complaint. Following submission of the motions directed to the original complaint, appellants filed a written motion for leave to amend the complaint by adding allegations challenging the Commission's finding that the transaction was consistent with the public interest, as well as many subsidiary findings, and by adding an allegation that the Commission abused its discretion in denying appellants' petition for rehearing and reconsideration. After argument, both oral and written, this motion was submitted for decision.

By its opinion dated April 12, 1957, the court granted the motion of defendants for judgment on the pleadings and the motion of defendants in intervention to dismiss the complaint, and denied plaintiffs' motion for leave to amend the complaint. All members of the court below concurred in the majority opinion upholding the jurisdiction of the Commission; Judge Harris dissented from denial of the motion for leave to amend. On May 29, 1957, appellants filed their notice of appeal from the judgment entered on May 3, 1957.

The issues presented by this appeal are:

1. Whether the Commission and the court below correctly decided that the Interstate Commerce Commission has exclusive and plenary jurisdiction under Section 5 of the Act to authorize a transaction under

which Pacific and Greyhound would acquire control of Golden Gate and Pacific would concurrently transfer certain properties and operating rights to Golden Gate; and

2. Whether the court below abused its discretion by denying plaintiffs leave to amend their complaint.

ARGUMENT

I. The Appeal from the Judgment Below Presents Questions Which Are So Unsubstantial That Further Argument Is Not Needed.

This appeal raises but two issues, neither of which has any substance in view of the terms of the statute and the holdings of all pertinent authorities. The questions presented do not warrant plenary consideration by this Court.

A. THE INTERSTATE COMMERCE COMMISSION AND THE COURT BELOW HAVE CORRECTLY DECIDED THAT ACQUISITION OF CONTROL OF GOLDEN GATE BY PACIFIC AND BY GREYHOUND IS A TRANSACTION WITHIN THE SCOPE OF SECTION 5 OF THE INTERSTATE COMMERCE ACT.

Appellants contend that the Commission does not have jurisdiction under Section 5 of the Act to authorize Pacific and Greyhound to acquire control of Golden Gate because Golden Gate is not presently an operating common carrier. The transaction approved by the Commission contemplates that Golden Gate will become an operating common carrier concurrently with the issuance of its capital stock whereby Pacific and Greyhound will acquire control of Golden Gate. The only jurisdictional question is whether Section 5 applies to an acquisition of control in cases where the corporation being controlled will become an operating common carrier concurrently with consummation of the transaction, but not before. In the terms of the statute, the question is whether the transaction constitutes an acquisition of control, "wheth-

er directly or indirectly", by "any carrier, or two or more carriers jointly, * * * of another through ownership of its stock or otherwise".

Golden Gate could not engage in the contemplated services, nor could Greyhound acquire control of Golden Gate, until authorized by the Commission. The court below correctly so held, stating succinctly:

"We have no difficulty in finding that the proposed transaction is covered by the language of the section; it merely says that approval of the Commission is required when one carrier acquires control of another. That is precisely what the Greyhound Corporation and Pacific are seeking to do here; although Golden Gate will not attain the status of a carrier until the operating rights of Pacific are transferred to it, neither will the parent corporations acquire control until then, for the properties and operating rights are to be simultaneously exchanged for the stock." (Juris. st., App. B, pp. 6-7)

That the Commission's jurisdiction necessarily includes the exercise of its authority to these ends, including jurisdiction as to a carrier "resulting" from the transaction so authorized, is plainly declared by statutory provision as well as by all reported authority.

The Statute.

The authority exercised by the Commission in the instant case is derived from Section 5(2)(a) of the Act, which provides, *inter alia*, that it shall be lawful, with the approval and authorization of the Commission,

"* * * for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * *"

Congress has not only provided that approval of such a transaction by the Commission is required, but it has declared in plain and unambiguous language in Section 5(4) of the Act that:

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate * * * the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, * * * or in any other manner whatsoever."*

Section 5(11) of the Act declares that:

"The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in *or resulting from any transaction approved by the Commission thereunder*, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; * * *." (Emphasis supplied.)

The transaction approved by the Commission comes precisely within the scope of Section 5. The jurisdiction conferred by the statute expressly extends to any carrier or corporation "*resulting from any transaction approved by the Commission*", and any unauthorized acquisition of control of such carrier is unlawful "however such result is attained, whether directly or indirectly, * * * or in any other manner whatsoever." It is plain that Golden Gate will be a carrier "resulting" from the transaction here approved by the Commission and that Greyhound could not acquire control of Golden Gate without receiving prior authorization

*Strangely enough, Section 5(4) is not even cited in the jurisdictional statement.

from the Commission. Advisedly, and necessarily, Congress left no such hiatus in the Commission's authority as is here urged by appellants.

The Cases.

In its report and order approving and authorizing the transaction, the Commission stated that:

"Jurisdiction is determined on the basis of facts existing at consummation, and Greyhound proposes to acquire control of Golden Gate concurrently with its becoming a carrier through the purchase. Jurisdiction has been asserted in numerous similar cases and is clear under Section 5." (Juris. st., App. D, pp. 41-2)

This exercise of the Commission's jurisdiction under Section 5 is in conformity with a uniform line of Commission decisions covering a period of more than fifteen years preceeding the ruling herein.* Subsequent Commission decisions authorizing comparable transactions have consistently applied the same principles.† The Commission's exercise of jurisdiction herein is plainly authorized by the terms of Section 5. Moreover, the contemporaneous construction of a statute by the agency charged with the responsibility for

*During this period of more than fifteen years, the Commission has frequently and consistently made rulings in conformity with its report and order herein. The following are representative: *Columbia Motor Service Co.—Purchase*, 35 M.C.C. 531, 534 (1940); *Consolidated Freightways, Inc.—Control—Consolidated Convoy Co.*, 36 M.C.C. 358, 359 (1941); *Takin—Purchase*, 37 M.C.C. 626, 627 (1941); *A. & W. Motor Lines—Purchase*, 38 M.C.C. 407 (1942); *Interstate Motor Freight System, Inc.—Purchase*, 39 M.C.C. 207, 208 (1943); *Transit, Inc.—Purchase*, 50 M.C.C. 433, 434 (1948); *Gehlhaus and Hollobinko—Control*, 60 M.C.C. 167, 169 (1954); *Southern Pacific Company Reincorporation*, 267 I.C.C. 523 (1947).

†See, for example, *Mickow Corp.—Purchase*, 65 M.C.C. 541 (1955) and *Colonial Fast Freight Lines, Inc.—Purchase*, 65 M.C.C. 619 (1956).

its administration is entitled to great weight when the agency's authority is questioned in the courts.*

Appellants' contention that the Commission had no authority under Section 5 to authorize Greyhound to acquire control of Golden Gate is foreclosed by this Court's decision in *Alleghany Corporation v. Breswick & Co.*, 353 U.S. 151 (1957), as well as by the several prior decisions construing "acquisition of control" as that term appears in Section 5 of the Act.

United States v. Marshall Transport Co., 322 U.S. 31 (1944);

New York Central Securities Corp. v. United States, 287 U.S. 12 (1932).

See, also:

Schwabacher v. United States, 334 U.S. 182, 191-2 (1948);

McLean Trucking Co. v. United States, 321 U.S. 67, 78-83 (1944).

Alleghany Corporation v. Breswick & Co., *supra*, held that a rearrangement within a railroad system constituted an "acquisition of control" under Section 5(2) of the Act. The Commission had jurisdiction to approve or disapprove such rearrangement within a railroad system notwithstanding the fact that the parents already controlled the subsidiary and the transaction represented only a change in the form of control. In the *Alleghany Corporation* case this Court said:

"In 1939, in *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 145-146, arising under the Federal

* *Alleghany Corporation v. Breswick & Co.*, 353 U.S. 151, 169 (1957); *United States v. American Trucking Associations*, 310 U.S. 534, 549 (1940); *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177, 182, 185 (1938).

Communications Act, 48 Stat. 1064, 1065, 47 U.S.C. § 152(b), this Court rejected artificial tests for 'control,' and left its determination in a particular case as a practical concept to the agency charged with enforcement. This was the broad scope designed for 'control' as employed by Congress in the Transportation Act of 1940, 54 Stat. 899-900, 49 U.S.C. § 1(3)(b). See *United States v. Marshall Transport Co.*, 322 U.S. 31, 38.

* * * * *

"Not labels but the nature of the changed relation is crucial in determining whether a rearrangement within a railroad system constitutes an 'acquisition of control' under § 5(2)." (353 U.S. at 163-4, 166)

And in *Schwabacher* this Court referred to a series of decisions construing Section 5 of the Act, as amended by the Transportation Act of 1920, 41 Stat. 456, summarizing these decisions as follows:

"The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system [Citations omitted]." (334 U.S. at 192)

The plain language of Section 5 and this series of decisions make it abundantly clear that the Commission had full authority to approve and authorize the transaction and that the transaction could not be accomplished without such prior approval. Another series of decisions gives further emphasis to the conclusion that appellants' challenge to the jurisdiction of the Commission is lacking in substance.

Section 408 of the Civil Aeronautics Act, 49 U.S.C. § 488, as noted by the court below, is comparable to Section 5 of the Interstate Commerce Act, both provisions

being directed to a common objective. Appellants here contend that the transaction is not within the scope of Section 5 because Golden Gate is not yet an operating common carrier. In *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F.2d 810 (C.A. 2d, 1941) the identical issue was raised respecting the jurisdiction of the Civil Aeronautics Board. A unanimous court of appeals refused to interpret so narrowly the control provisions of the Civil Aeronautics Act, stating by Judge Augustus N. Hand:

"This seems to us an unduly literal interpretation of subdivision (5). In our opinion 'to acquire control of any air carrier in any manner whatsoever' is to take all steps involved in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources, with a certificate authorizing operation. Any other interpretation would enable a steamship company, by organizing a subsidiary for air carriage, to escape the requirement of Section 408(b) that the 'Authority shall not enter . . . an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition'." (p. 815)

The decisions in *National Air Freight Forwarding Corp. v. Civil Aeronautics Board*, 197 F.2d 384 (C.A. D.C., 1952) and *Continental Southern Lines, Inc. v. Civil Aeronautics Board*, 197 F.2d 397 (C.A. D.C., 1952) cert. den., 344 U.S. 831, are in accord and expressly follow the *Pan American* decision.

The Potential Jurisdictional Void.

The dangers implicit in appellants' theory of the limited scope of Section 5 have been recognized by this Court in

rejecting any such interpretation of the meaning of "acquisition of control". In *Alleghany Corporation v. Breswick & Co.*, 353 U.S. 151 (1957), it was said with respect to common control transactions that the crucial issue is "not the immediacy or remoteness of the parent from the proposed transaction, for, as we said in the *Marshall Transport* case, the parent can always, by operating through subsidiaries, make itself more remote." (p. 169) The Court continued:

"Denial of power to the Commission to regulate the elimination of the Jeffersonville from the national transportation scene would be a disregard of the responsibility placed on it by Congress to oversee combinations and consolidations of carriers and 'to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * *' and the further requirements that 'All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.' National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding § 1." (pp. 170-1)

Similarly, the Court of Appeals for the District of Columbia Circuit in *National Air Freight Forwarding Corp. v. Civil Aeronautics Board*, 197 F.2d 384, *supra*, has warned against unduly restricting the Congressional delegation of regulatory jurisdiction in the field of capital structures and inter-carrier relationships. Addressing itself specifically to the opportunity which would be afforded for successful evasion of the statutory objective if the agency's authority were to be restricted to common carriers presently existing, excluding carriers "resulting" from transactions submitted for the agency's approval, the court said:

"Since such a company is not an air carrier until a certificate has been issued, it would appear at first blush

that its relationships to other types of carriers are not subject to the restriction of § 408. It has been held, however, in *Pan American Airways Co. v. Civil Aeronautics Board*, 2 Cir., 1941, 121 F.2d 810, that the very process of certification brings the control relationships between the newly certificated air carrier and its parent within § 408. Otherwise a common carrier seeking entry into the air transportation field would be able to evade § 408 merely by organizing a subsidiary and causing it to apply for a certificate of public convenience and necessity under § 401. We agree with the Pan-American decision that it would be unwise for the Board to close its eyes to the fact that with completion of the certification process, there would be in existence an air-surface carrier control relationship which important segments of the Act were designed to regulate." (197 F.2d at 386)

The Interstate Commerce Commission has also shown an awareness of such problems. The Commission has repeatedly called attention to dangers of this character.*

In an effort to close this void in the regulatory structure which would necessarily arise from adoption of their theory, appellants argue that the Commission should have acted under the limited jurisdiction conferred by Section 212 (b) of the Act, 49 U.S.C. § 312 (b). Appellants' suggestion is ill advised. Section 212(b), by its terms, is made expressly inapplicable to a transaction governed by Section 5 of the Act. As has already been demonstrated,

*The Commission's statement in *Raymond Bros. Motor Transportation, Inc.—Purchase*, 37 M.C.C. 431, 433 (1941), is typical. See also, the following Commission decisions illustrating the detrimental consequences if jurisdictional voids were to be created in this field: *Wilson Storage and Transfer Co.—Purchase*, 36 M.C.C. 221, 227 (1940); *Texas, New Mexico and Oklahoma Coaches, Inc.—Purchase*, 55 M.C.C. 269, 275 (1948); *Mooney—Control*, 56 M.C.C. 771, 781 (1950), 60 M.C.C. 103 (1954); *Bekins—Control*, 65 M.C.C. 56, 59 (1955).

and as both the Commission and the court below have held, this record presents a transaction within the scope of Section 5 and therefore is governed by Section 5 rather than by Section 212(b). The latter section merely authorizes, subject to such rules and regulations as the Commission may prescribe, the transfer of any certificate or permit authorizing interstate operations. But the transaction herein includes more than a mere transfer of a certificate authorizing operations; acquisition of control of Golden Gate is the crucial element which makes the transaction subject to Section 5. As previously pointed out, the control of Golden Gate could not lawfully be acquired without an appropriate order made under Section 5. Contrary to appellants' representation, this holding by both the Commission and the court below does not render Section 212(b) "completely meaningless". (Juris. st., p. 14) Section 212(b) has direct application to all transfers which, because not more than twenty motor vehicles are involved in the transaction, are exempt under Section 5(10) of the Act. See *United States v. Resler*, 313 U.S. 57 (1941).

When an order has been made in accordance with Section 5 of the Act, rested upon findings that the transaction complies with the exacting standards of Section 5, it conveys authority permitting such transaction to be carried into effect "without invoking any approval under State authority"; the Commission's authority is expressly declared by the terms of Section 5(11) of the Act to be "exclusive and plenary".*

*See *Seaboard Air Line Railroad Co. v. Daniel*, 333 U.S. 118 (1948); *Schwabacher v. United States*, 334 U.S. 182 (1948); and *Thompson v. Texas Mexican Railway Co.*, 328 U.S. 134 (1946). As appellants seemingly would have it, state authority rather than the federal Commission should have paramount control over relations of this character between interstate carriers. (Juris. st., p. 9)

The Commission correctly determined that the transaction came within the scope of Section 5 and properly exercised its "exclusive and plenary" jurisdiction in approving and authorizing the transaction.

B. THERE WAS NO ABUSE OF DISCRETION BY THE COURT BELOW IN DENYING PLAINTIFFS LEAVE TO AMEND THEIR COMPLAINT.

We have previously pointed out that the complaint as filed raised but a single issue of law—whether the transaction was within the scope of Section 5 and therefore subject to the exclusive and plenary jurisdiction of the Commission. By the motion for leave to amend, plaintiffs requested permission to add new allegations challenging the Commission's finding that the transaction was consistent with the public interest, challenging many subsidiary findings which were alleged to be without record support, and charging the Commission with an abuse of discretion in denying appellants' petition for rehearing and reconsideration.

Defendants had answered the complaint, defendants in intervention had requested and obtained permission to intervene, the three-judge court had been convened, the motions directed to the complaint had been filed and the time for hearing thereon scheduled by the court—all without any indication that appellants intended to request permission to amend the complaint. The initial suggestion or indication that appellants might desire to ask leave to amend was made in the course of final argument on the motions to dismiss and for judgment on the pleadings. Appellants had in fact conceded that the case was ready for final judgment by making their own motion for judgment on the pleadings, which was heard concurrently with the motions of defendants and defendants in intervention. The actual motion for leave to amend the complaint was

made *after* the only issue raised by the complaint had been submitted for decision. No reasons justifying this tardy request were submitted by appellants. They admitted that the proposed amendment related to issues known to them when the complaint was filed and that the failure to raise these issues was not due to inadvertence or oversight; the *only* explanation offered of record was that appellants' counsel had reappraised his case and now desired to make such a sweeping challenge to the basic findings made by the Commission. Appellants renew this same explanation. (Juris. st., p. 18).

The mere statement of the undisputed facts bearing upon this unusual last minute request establishes without question that the court below was manifestly justified in denying the motion, after having given appellants full opportunity to present any reasons they may have had in support of their request for leave to amend. The only reason advanced was in effect that appellants had lost confidence in the only issue raised by the original complaint and therefore had decided to raise additional issues. The same reason has now been repeated. (Juris. st., p. 18) When the complaint herein was filed, appellants' counsel was thoroughly familiar with the record before the Commission, having represented appellants during the entire proceedings. The appellants' decision not to challenge the Commission's findings was advisedly made. If there had been the remotest chance that these findings were not fully supported by the record, it is inconceivable that appellants' counsel would have omitted to challenge them in the original complaint.

All of the factors to be considered by the court in exercising its discretion pursuant to Rule 15, Federal Rules of Civil Procedure, militated heavily against the motion for

leave to amend.* There was no abuse of discretion in the court's denial of appellants' belated request for permission to challenge the Commission's findings upon the additional grounds set forth in the proposed amended complaint, no showing having been made to warrant appellants' seriatim attack on the Commission's order.†

II. The Judgment Below Should Be Affirmed Forthwith.

Appellants' case is wholly lacking in substance. The judgment below should be affirmed forthwith because "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." (Rule 16(1)(c), Revised Rules of the Supreme Court of the United States)

The unsubstantial nature of appellants' case impels one to the inference that they are primarily interested in achieving delay and postponing consummation of the transaction approved by the Commission. Appellants cannot be unaware of the circumstance that further argument and delay would be an unwarranted burden on the Court, would be detrimental to the public interest and would benefit only appellants. The Commission found that the public interest would

*The following are some of the cases justifying denial of appellants' motion for leave to amend their complaint: *In re Hudson & Manhattan R. Co.*, 229 F.2d 616, 621 (C.A. 2d, 1956), cert. den., 351 U.S. 982; *Calhoun County v. Roberts*, 148 F.2d 901; 903-4 (C.A. 5th, 1945); *Schaad v. New York Life Ins. Co.*, 79 F. Supp. 463, 468 (E.D. Tenn., 1948); *Hart v. Knox County*, 79 F. Supp. 654, 658 (E.D. Tenn., 1948); *Friedman v. Transamerica Corp.*, 5 F.R.D. 115, 116 (D. Del., 1946); *Redmond v. O'Sullivan Rubber Co.*, 10 F.R.D. 536, 538 (W.D. Va., 1944); *Schick v. Finch*, 8 F.R.D. 639, 640 (S.D. N.Y., 1944).

†The dissenting opinion below is grounded on the unwarranted assumption that the statutory three-judge court may substitute its views on consistency with the public interest for the judgment of the Commission. On the other hand, the majority of the court below acted within well established limits upon the court's reviewing power.

not be served by the "impractical retention in a single entity of highly dissimilar operations * * * [causing] the undesirable results shown by this record". (Juris. st., App. D, p. 48) Appellants, displaying little regard for the controlling public interest, have shown no disposition to permit these "undesirable results" to be corrected without further delay. But Congress, in creating a special method for reviewing orders of the Commission, provided procedures "to avert the delays ordinarily incident to litigation". *United States v. Griffin*, 303 U.S. 226, 233 (1938) The practice of this Court pursuant to Rule 16 directly implements the Congressional policy to expedite judicial review of Commission orders.

CONCLUSION

Inasmuch as the questions on which decision of this cause depends are so unsubstantial as not to need further argument, the judgment below should be affirmed forthwith.

Respectfully submitted,

ALLAN P. MATTHEW

GERALD H. TRAUTMAN

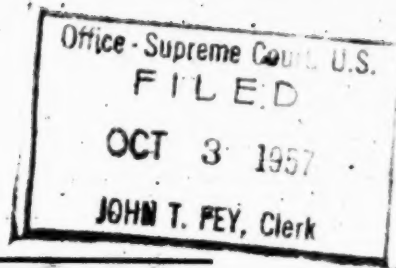
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Dated at San Francisco, California, September 25, 1957.

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SUPREME COURT, U.S.



No. 415

In the Supreme Court of the United States

OCTOBER TERM, 1957

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN
COUNTY FEDERATION OF COMMUTERS CLUBS AND
CONTRA COSTA COUNTY COMMUTERS ASSOCIATION,
APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COM-
MERCE COMMISSION, APPELLEES,

AND

GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND
LINES, AND THE GREYHOUND CORPORATION, APPELLEES
IN INTERVENTION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION

MOTION TO AFFIRM

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IN INTERVENTION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Re-
vised Rules of this Court, appellees United States
of America and Interstate Commerce Commission
move that the judgment of the district court be
affirmed.

STATEMENT

This is a direct appeal from a final judgment, en-
tered on May 3, 1957, by a three-judge district court

convened pursuant to 28 U. S. C. 2284 and 2325, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission and denying appellants' motion for leave to amend the complaint. The order, issued pursuant to the provisions of Section 5 of the Interstate Commerce Act, approved an application (a) for Pacific Greyhound Lines (hereinafter referred to as Pacific) to acquire control of Golden Gate Transit Lines (hereinafter referred to as Golden Gate) through ownership of all the outstanding capital stock of the latter, (b) for the contemporaneous purchase by Golden Gate of certain operating rights, both interstate and intrastate, and other property of Pacific in exchange for the outstanding capital stock of Golden Gate, and (c) for the acquisition of concurrent control, along with Pacific, by the Greyhound Corporation (hereinafter referred to as Greyhound) of Golden Gate and of the operating rights and properties to be acquired by the latter.

On February 8, 1954, Greyhound, Pacific (at that time a subsidiary of Greyhound),¹ and Golden Gate filed with the Commission the above-mentioned application. At a hearing in April, 1954, appellants appeared and objected to the granting of the application on the grounds that the proposed transaction (1) was not within the scope of Section 5 of the Interstate Commerce Act, and (2) was not consistent with the

¹ Pacific and Greyhound have since been merged, but for purposes of clarity we retain the terminology used by the Commission and the court below, since the merger does not have impact on this case.

public interest. Thereafter, in October 1954, the examiner issued a proposed report recommending denial of the application on the ground that it was not consistent with the public interest. Objections to this proposed report were filed by applicants, following which the full Commission, on July 6, 1955, issued its report and order granting the application, subject to certain terms and conditions set forth in the order. A petition for rehearing and reconsideration was denied by the full Commission on September 19, 1955.

The complaint, which was filed October 18, 1955, challenged the order of the Commission solely on the ground that the transaction did not come within the scope of Section 5 and that the Commission therefore lacked jurisdiction. The United States and the Commission filed answers and moved for judgment on the pleadings. Appellees in intervention moved to dismiss the complaint for failure to state a claim. Argument was heard on these motions on February 23, 1956, when, for the first time, appellants indicated an intention to seek leave to amend their complaint in order to challenge the sufficiency of the Commission's findings of fact. This motion was filed February 28, 1956, and the court heard argument on it on April 20, 1956.

In its memorandum opinion of April 12, 1957, the court granted the motions of appellees and appellees in intervention, ordered the complaint dismissed with prejudice, and denied the motion to amend the complaint. In a separate opinion, Judge Harris concurred in the majority decision sustaining the jurisdiction of the Commission but dissented from the

refusal to grant appellants permission to amend their complaint.

ARGUMENT

I

THE COMMISSION HAD JURISDICTION OVER THE TRANSACTION UNDER SECTION 5 OF THE INTERSTATE COMMERCE ACT

Section 5 (2) (a) of the Interstate Commerce Act provides in relevant part that it shall be lawful, with the approval and authorization of the Commission, "for any carrier * * * to acquire control of another through ownership of its stock or otherwise." Both the Commission and the court below found that a transaction whereby a carrier (Pacific) proposed to transfer part of its intrastate and interstate operating rights to another company (Golden Gate), which thereupon would become a carrier, and, in exchange, would concurrently acquire control of the latter company through acquisition of its stock, required approval by the Commission under Section 5 (2) (a). This conclusion, which is consistent with prior decisions of the Commission in similar cases, with the judicial construction placed on a comparable provision of the Civil Aeronautics Act, and with decisions of this Court construing Section 5, raises no substantial question.

Involved in this proceeding are Pacific's suburban-commuter operating rights in the San Francisco Bay area, together with certain closely related interstate operating rights. The Commission's order found that it would be consistent with the public interest if the above operations were segregated from Pacific's

intercity long haul operations by placing the former under separate management. To permit this, the Commission approved the transfer of the largely local operating rights, together with certain properties, including \$250,000 in cash, to Golden Gate, a separate and new corporation, which was not then a carrier but would become such on consummation of the transaction. The Commission also approved the simultaneous acquisition of control of Golden Gate by Pacific through ownership of all of its capital stock.

There is no suggestion in Section 5 (2) (a) that the Commission's jurisdiction to approve or disapprove intercarrier control relationships is limited by the method by which, or the time at which, such relationships are created. That the Commission's jurisdiction is not limited to transactions between carriers existing at the time the proposal is submitted, but includes those who will become carriers as a result of the transaction, is made plain by Section 5 (11) of the Act, which describes those subject to Section 5 as "any carrier or corporation participating in *or resulting from* any transaction approved by the Commission" (emphasis added). Admittedly, upon consummation of the transaction, Pacific (a carrier) would acquire control of Golden Gate (another carrier), and that jurisdictional fact is not altered because Pacific may have previously held the operating rights involved.

In the instant case the Commission ruled (65 M. C. C. 347, 358; Juris. Statement 41-42):

It is apparent that if the transaction were accomplished without prior authority it would be in

violation of Section 5 (4). Jurisdiction is determined on the basis of facts existing at consummation, and Greyhound proposes to acquire control of Golden Gate concurrently with its becoming a carrier through the purchase. Jurisdiction has been asserted in numerous similar cases and is clear under Section 5.

As early as 1940, and continuously since then, the Commission has so construed the Act. *Columbia Motor Service Co.—Purchase—Columbia Terminals Co.*, 35 M. C. C. 531 (1940) involved applications for authority for Columbia Terminals to acquire the capital stock of Columbia Motor, a new corporation, and for the latter to acquire from Terminals certain interstate and intrastate operating rights. There, as here, the purpose of the transaction was to permit separation in different but controlled companies of dual operations formerly conducted by a single entity. The Commission held (p. 534):

As the proposed purchase by Motor Service of the previously described motor-carrier properties of Terminals and the contemporaneous acquisition of control of the former by the latter are in reality a single transaction, involving acquisition of control of a motor carrier through stock ownership, the matter is subject to our prior approval under section 213,² and our findings relate to the entire transaction. Compare *Boyle Bros., Inc.—Control—Speedway Transp. Co., Inc.*, 35 M. C. C. 45,

² Prior to the Transportation Act of 1940, acquisitions of motor carriers were governed by Section 213 of the Interstate Commerce Act. By that Act, Section 213 was deleted, and all acquisitions, regardless of the type of carrier, were put under Section 5, which originally applied only to railroads.

and *Clardy—Control—Bulk Haulers, Inc.*, 35 M. C. C. 93.

See also, *Consolidated Freightways, Inc.—Control—Consolidated Convoy Co.*, 36 M. C. C. 358 (1941); *Takin—Purchase—Takin Bros. Freight Line, Inc.*, 37 M. C. C. 626 (1941); *Gehlhaus and Hollobinko—Control*, 60 M. C. C. 167 (1954).

The Commission's view that Section 5 (2) (a) is not limited to transactions between existing carriers, but applies as well to transactions which, when consummated, will result in one carrier acquiring control of another, finds support in judicial decisions under the comparable provision of Section 408 (b) of the Civil Aeronautics Act (49 U. S. C. 488 (b)), which provides that it shall be unlawful, unless approved by order of the Board, for any air carrier to acquire control of any air carrier in any manner whatsoever.

In *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F. 2d. 810 (C. A. 2, 1941), review was sought of an order of the Board which granted a certificate for temporary air transportation to American Export Airlines, Inc., but dismissed that part of the application which sought Board approval under Section 408 (b) of the control of applicant by its parent, American Export Lines. At the time of the application, American Export Airlines was not an air carrier, and the Board dismissed the application on the ground that the above section "applies to cases involving the control of air carriers only where the acquisition of control of a corporate entity occurs at a time when that entity is already an air carrier." The

Court of Appeals, in rejecting this interpretation, said (p. 815):

In our opinion "to acquire control of any air carrier in any manner whatsoever" is to take all steps involved in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources, with a certificate authorizing operation.

Similarly, in *National Air Freight Forwarding Corp. v. Civil Aeronautics Board*, 197 F. 2d 384 (C. A. D. C., 1952), the court held that the statute confers on the Board jurisdiction not only over a carrier that is seeking control of another carrier already in existence, but also over all steps preliminary to bringing the second carrier into existence.

Finally, we submit that the Commission order finds support in the decisions of this Court which have consistently construed Section 5 as requiring Commission approval of transactions whereby one rail carrier, even though it already enjoys substantially complete control of another carrier through stock ownership or subsidiaries, acquires some form of new control of the existing operating rights of the latter. *New York Central Securities Corp. v. United States*, 287 U. S. 12; *United States v. Marshall Transport Co.*, 322 U. S. 31; *Alleghany Corp. v. Breswick & Co.*, 353 U. S. 151. As this Court stated in *Breswick* (p. 169), "The crux of each inquiry * * * is the nature of the change in relations between the companies" and "the finding of the Commission that a given transaction does or does not constitute a significant increase in

the power of one company over another is not to be overruled so long as 'there is warrant in the record for the judgment of the expert body. * * *'
Rochester Telephone Corp. v. United States, 307 U. S. 125, 146."

The Commission has recognized that the advantages of separate management for different types of motor transportation operations is a valid ground for the exercise of its powers under Section 5 (2) (a). In the instant case the Commission found that advantages in management consistent with the public interest would result from segregating into a separate company Pacific's short-haul commuter operations. Of paramount importance is the fact that Pacific will acquire legal and factual control of a new and separate carrier. It is submitted that the Commission's construction of Section 5 (2) is clearly justified if it is to "control rate and capital structures, physical makeup and relations between carriers, in the light of the public interest in an efficient national transportation system." *Schwabacher v. United States*, 334 U. S. 182, 192.*

* Appellants' contention that under such a construction Section 212 (b) would become completely meaningless is without substance. Section 212 (b) applies only to transfers not covered by Section 5, as for example, a transaction involving less than 20 vehicles (Section 5 (10)) or a transfer which does not involve the acquisition of control of the transferee.

II

DENIAL OF THE MOTION TO AMEND WAS NOT AN ABUSE
OF DISCRETION

The court below clearly did not abuse its discretion in denying appellants' motion to amend their complaint under Rule 15 (a) of the Federal Rules of Civil Procedure. While this rule is to be construed liberally, such a motion is not to be granted as a matter of course, but only "when justice so requires."

Appellants expressly disavow any negligence or inadvertence (Juris. Statement 18) and assert, in substance, that, in the absence of a showing of prejudice to other parties, it is an abuse of discretion for a district court to deny permission to amend at any time and for any purpose, even though the change represents an entirely new theory of action. On the contrary, the interests of justice would not be served by a construction of Rule 15 (a) which would permit *seriatim* attacks on Commission orders without any showing of lack of knowledge, mistake, inadvertence or justification. Such a construction would result in prejudicial delays contrary to the declared policy that Commission orders be speedily reviewed. *United States v. Griffin*, 303 U. S. 226. It would also prevent orderly consideration of cases by the courts.

We have been unable to find any case where, on similar facts, a motion to amend has been granted. On the other hand, the decision below accords with decisions of other courts where the motion was filed at the last moment and where the amendment sought to change the whole nature of the complaint. *Schick*

v. *Finch*, 8 F. R. D. 639, 640 (S. D. N. Y.); *Friedman v. Transamerica Corp.*, 5 F. R. D. 115, 116 (D. Del.); *In Re Hudson & Manhattan Railroad Company*, 229 F. 2d. 616, 621 (C. A. 2). In these circumstances, there is no warrant on this record for holding that the district court abused its discretion in refusing to permit an amendment to the complaint for the purpose of challenging the findings of fact of the Commission where the complaint had raised only the jurisdictional question, and where the first indication that such an amendment would be sought was during oral argument of the jurisdictional question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

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OCTOBER 1957.

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1957

No. 415.

COUNTY OF MARIN, COUNTY OF CONTRA COSTA,
MARIN COUNTY FEDERATION OF COMMUTERS
CLUBS, and CONTRA COSTA COUNTY COM-
MUTERS ASSOCIATION,

Appellants,

VS.

UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION, GOLDEN GATE TRANSIT
LINES, PACIFIC GREYHOUND LINES, and THE
GREYHOUND CORPORATION,

Appellees.

Appeal from Judgment of the United States District Court for the
Northern District of California, Southern Division

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Pacific Greyhound Lines and
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Dated March 31, 1958

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA COSTA,
MARIN COUNTY FEDERATION OF COMMUTERS
CLUBS, and CONTRA COSTA COUNTY COM-
MUTERS ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION, GOLDEN GATE TRANSIT
LINES, PACIFIC GREYHOUND LINES, and THE
GREYHOUND CORPORATION,

Appellees.

Appeal from Judgment of the United States District Court for the
Northern District of California, Southern Division

Brief for Appellees, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation

OPINIONS OF THE COURT BELOW AND OF THE INTERSTATE COMMERCE COMMISSION

The opinions of the court below are reported at 150 F.
Supp. 619 (N.D. Cal. 1957) and are set forth in the printed
transcript of record, pages 111 to 124, (herein referred to
as "Tr.")

The Interstate Commerce Commission's report and order dated July 6, 1955 are reported in full at 65 M.C.C. 347 and are set forth in the transcript at Tr. 8 to 41.

GROUND ON WHICH JURISDICTION IS INVOKED

This is a direct appeal from a final judgment entered on May 3, 1957 by a District Court of three judges specially constituted pursuant to Sections 2284 and 2325 of Title 28 of the United States Code, pages 4411 and 4413. The judgment dismissed appellants' complaint, which sought to set aside and annul an order of the Interstate Commerce Commission, and denied appellants' motion for leave to amend the complaint.

Jurisdiction of this Court is invoked under Sections 1253 and 2101 of Title 28 of the United States Code, pages 4181 and 4402, and Section 45 of Title 49 of the United States Code, page 7155.

STATUTES AND RULES WHICH ARE INVOLVED

This appeal involves the interpretation of Sections 5 and 212(b) of the Interstate Commerce Act (49 U.S.C. §§ 5 and 312(b), 1952 Ed., Vol. 5, pp. 7116-7118 and 7191) and Rule 15 of the Federal Rules of Civil Procedure (28 U.S.C. foll. § 2072, 1952, Ed., Vol. 3, p. 4306).

The pertinent text of these statutes and rules is set forth in the appendix to this brief. The text of Section 408 of the Civil Aeronautics Act (49 U.S.C. § 488, 1952 Ed., Vol. 5, pp. 7222-7223) is also set forth in the appendix.

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this appeal are:

1. Whether the court below correctly decided that the Interstate Commerce Commission has exclusive and plenary jurisdiction under Section 5 of the Interstate Commerce Act

to authorize a transaction under which a common carrier by motor vehicle would acquire control of a newly organized motor carrier to whom certain interstate and intrastate operating rights and properties would be concurrently transferred by the corporation acquiring such control.

2. Whether the court below abused its discretion in denying plaintiffs leave to amend their complaint where the motion was tardily filed after the only issue raised by the complaint had been heard and where the failure to include the additional issues in the original complaint was not due to inadvertence or oversight.

During a period of more than fifteen years, in an unbroken line of decisions, the Interstate Commerce Commission has exercised its jurisdiction under Section 5 of the Interstate Commerce Act to authorize comparable transactions. The Commission's authority is plainly declared by statutory provision and supported, without exception, by all reported authority.

STATEMENT OF THE CASE

On February 8, 1954, Pacific Greyhound Lines, Golden Gate Transit Lines and The Greyhound Corporation (herein called "Pacific", "Golden Gate" and "Greyhound", respectively) filed joint applications with the Interstate Commerce Commission (herein called "the Commission") for an appropriate order, under Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5 (herein called "the Act"), authorizing a transaction under which (1) Pacific would acquire control of Golden Gate through ownership of capital stock; (2) Pacific would transfer certain properties and operating rights to Golden Gate; (3) Greyhound would acquire control of Golden Gate through Pacific; and (4) by a separate application as a matter directly related to the applications under Section 5, Pacific would continue operations over

portions of the routes to be transferred to Golden Gate. (The foregoing requested authorization will herein be called "the transaction".)

When the joint applications were filed Pacific was a common carrier of passengers by motor vehicle in both interstate and intrastate commerce in seven states in the western United States. The transaction described in footnote 2 of the Commission's report (Tr. 9) has now been consummated. Pacific has been merged into Greyhound and Pacific's operations are presently being conducted by Greyhound.* Golden Gate is a newly organized corporation authorized by its articles to engage in the transportation of passengers by motor vehicle. Golden Gate is not presently an operating common carrier, but it will become such upon consummation of the transaction authorized by the Commission's order. The operating rights to be transferred to Golden Gate include both intrastate and interstate services,† and comprehend local operations for distances up to 25 or 30 miles in the San Francisco Bay area, styled by the Commission "commuter operations" (Tr. 11). These operations accounted for approximately 35% of the total number of passengers being transported by Pacific when the joint applications were filed (Tr. 11). In addition to the operating rights to be transferred, Golden Gate would also receive \$250,000 in cash, 190 buses with the right to lease up to 100 additional buses from Greyhound, and certain other assets amounting to approximately \$1,555,000, in the aggregate (Tr. 12, 13,

*Under the law of the State of Delaware which is applicable to that merger, pending actions by or against the merged corporation may proceed as if the merger had not taken place.

†The interstate traffic of Golden Gate would produce 5.7% of its total revenues according to the estimate of the Interstate Commerce Commission. Golden Gate's intrastate rates would continue to be subject to the regulatory jurisdiction of the California Public Utilities Commission to the same extent as at present. (Tr. 29).

17, and 29). It is expected that approximately 310 drivers and between 34 and 44 other employees would be transferred to Golden Gate (Tr. 14). If Golden Gate had operated for the entire year 1953 over the routes to be transferred, it would have received an estimated \$3,694,600 in passenger revenues from both its interstate and intrastate traffic (Tr. 16).

At the public hearing on these applications, appellants County of Marin, County of Contra Costa, Marin County Federation of Commuter Clubs and Contra Costa County Commuters Association, plaintiffs below, appeared to oppose the applications. The applications were also opposed by representatives of Pacific's employees (herein called "the Union") who were plaintiffs below.* Following the public hearing briefs were filed, an Examiner's proposed report was issued, exceptions thereto were filed and oral argument was had before the full Commission. By its report and order dated July 6, 1955, 65 M.C.C. 347 (Tr. 8 to 41), the Commission, without dissent, found *inter alia* that the transaction was within the scope of Section 5(2)(a) of the Act, that the transaction was consistent with the public interest, and that an appropriate order should be entered approving and authorizing the transaction. Appellants' (protestants before the Commission) petition for rehearing and reconsideration was denied.† In concluding that the transaction was consistent with the public interest, the Commission found that the following were some of the benefits to be in prospect:

*By stipulation and order of court prior to entry of judgment, Civil Action No. 34985 and the complaint on file therein were dismissed as to the Union.

†The Commission's order originally provided that unless the transaction was consummated within 180 days from the effective date of the order the authorization would be terminated. This period has from time to time been extended, the current expiration date being June 16, 1958.

(1) Elimination of the burden on interstate commerce occasioned by operating deficits resulting from inadequate fares on local services thereby requiring such deficits to be defrayed out of Pacific's revenue from the transportation of long-haul interstate passengers (Tr. 17-20, 28);

(2) Separation of "highly dissimilar" local and long-haul operations (Tr. 27);

(3) Completely separate management experienced in local rather than long-haul operations (Tr. 28);

(4) Improvement of labor-management relations (Tr. 21, 29);

(5) Improvement of public relations (Tr. 28);

(6) Facilitation of ultimate integration into the contemplated rapid transit system (Tr. 29).

On October 18, 1955, plaintiffs (appellants herein) commenced Civil Action No. 34985 to annul this order of the Commission. The complaint tendered but a single issue of law—whether the Commission exceeded its jurisdiction in approving and authorizing the transaction. Pacific, Golden Gate and Greyhound intervened as defendants, and, after the statutory three-judge District Court was convened, moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The United States and the Commission, after answering, jointly moved for judgment on the pleadings; appellants likewise moved for judgment on the pleadings. During final argument on these motions appellants made their initial request for permission to amend the complaint. Following submission of the motions directed to the original complaint, appellants filed a written motion for leave to amend the complaint by adding allegations challenging the Commission's finding that the transaction was consistent with the public interest, as well

as many subsidiary findings, and by adding an allegation that the Commission abused its discretion in denying appellants' petition for rehearing and reconsideration. After argument, both oral and written, this motion was submitted for decision.

By its opinion dated April 12, 1957, the court granted the motion of defendants for judgment on the pleadings and the motion of defendants in intervention to dismiss the complaint, and denied plaintiffs' motion for leave to amend the complaint. All members of the court below concurred in the majority opinion upholding the jurisdiction of the Commission; Judge Harris dissented solely from denial of the motion for leave to amend. On May 29, 1957, appellants filed their notice of appeal from the judgment entered on May 3, 1957 (Tr. 124-8). After the jurisdictional statement was filed, all appellees moved to affirm. On November 12, 1957, probable jurisdiction was noted (Tr. 131, 355 U.S. 866, 78 S.Ct. 116).

SUMMARY OF ARGUMENT

- I. **The Court Below Has Correctly Decided That Acquisition of Control of Golden Gate by Pacific and by Greyhound Is a Transaction Within the Scope of Section 5 of the Interstate Commerce Act.**

The terms of Section 5, a uniform line of Commission decisions and all pertinent reported court cases are opposed to appellants' contention that Section 5 of the Act does not comprehend jurisdiction in the Commission to authorize acquisition of control of a newly organized carrier to which certain interstate and intrastate operating rights and properties would be concurrently transferred by the corporation acquiring such control.

A. THE INTERSTATE COMMERCE ACT.

The authority exercised by the Commission in approving the transaction is derived from Section 5(2)(a) of the Act, making it lawful with the approval of the Commission, " * * * for any carrier * * * to acquire control of another through ownership of its stock or otherwise; * * *". The jurisdiction conferred by the statute expressly extends to any carrier or corporation "resulting from any transaction approved by the Commission," and any unauthorized acquisition of control of such carrier is unlawful "however such result is attained, whether directly or indirectly, * * * or in any other manner whatsoever." The jurisdiction lodged with the Commission is declared to be "exclusive and plenary" and any carrier participating in the transaction authorized by the Commission may carry the transaction into effect "without invoking any approval under State authority." As the court below held, Section 5 makes it unlawful both for Golden Gate to engage in the contemplated services and for Greyhound to acquire control of Golden Gate until and unless such operations and acquisition of control have been authorized by the Commission.

The main thrust of appellants' argument on the jurisdictional question is to the effect that the legislative history of Section 5 shows an intention to exclude so-called "split-ups." Neither the legislative history nor the terms of Section 5 lends support to appellants' contention. Although the dominant purpose of the Transportation Act of 1940 was to foster voluntary mergers and consolidations, there is no indication that Congress thereby intended to deprive the Commission of jurisdiction over all forms of common control transactions. There is nothing in the legislative history which detracts from the force of Section 5(4) of the Act by which unauthorized acquisitions of control are made unlawful "*however such result is attained.*" Appellants'

version of the Congressional purpose underlying Section 5, in the words of the court below, "ignores the whole regulatory scheme of the Interstate Commerce Act."

B. COMMISSION DECISIONS.

Without exception in a uniform line of cases covering a period of more than 15 years, the Interstate Commerce Commission has construed Section 5 to govern transactions comparable to the Golden Gate transaction. This long continued and generally unchallenged construction of Section 5 by the Commission is entitled to great weight and should not be overturned except for compelling reasons.

C. COURT DECISIONS.

The Commission's exercise of its jurisdiction in authorizing the acquisition of control of Golden Gate accords with a series of decisions of this Court covering a period of more than 25 years. These decisions construe Section 5 of the Act so as to confer upon the Interstate Commerce Commission the duty to control capital structures, physical make-up and relations between carriers in the light of the public interest in an efficient national transportation system, regardless of State law. This Court has given broad scope to the term "acquisition of control" as employed by Congress and has rejected artificial distinctions such as that suggested by appellants.

In a series of decisions arising under the Civil Aeronautics Act, the identical issue was raised respecting the jurisdiction of the Civil Aeronautics Board. In each of these cases, the courts refused to restrict the common control provisions of the Civil Aeronautics Act to cases where the acquisition of control occurred at a time when the person being controlled was already an operating air carrier.

D. THE POTENTIAL JURISDICTIONAL VOID.

Appellants' theory of the limited scope of Section 5 would afford avenues for successful evasion of the statutory objective, as this Court, other courts and the Commission have recognized. If the authority of the Interstate Commerce Commission or of the Civil Aeronautics Board were to be restricted to common carriers presently existing, excluding carriers "resulting" from transactions submitted for the agency's approval, a carrier could eliminate competitors without the agency's approval, a rail carrier could acquire control of a motor carrier without the Commission's approval and a surface carrier could acquire control of an air carrier without the approval of the Civil Aeronautics Board. These and other avenues for evasion would immediately appear.

In an effort to close this void in the regulatory structure, appellants argue that the Commission should have acted under the limited jurisdiction conferred by Section 212(b) of the Act. However, this section is expressly made inapplicable to a transaction governed by Section 5. Since one of the elements of the transaction herein is the acquisition of control of Golden Gate, the transaction is subject to Section 5 rather than Section 212(b).

E. THE EXCLUSIVE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.

When an order has been made in accordance with Section 5 of the Act, it conveys authority permitting such transaction to be carried into effect "without invoking any approval under State authority," the Commission's authority being declared to be "exclusive and plenary." Of necessity, when interstate and intrastate services are inextricably intertwined, the federal authority over both is complete and paramount. In exercising under Section 5 its exclusive and

plenary jurisdiction to approve and authorize the Golden Gate transaction, the Commission has not deprived the State Commission of its jurisdiction to regulate Golden Gate's intrastate rates.

II. There Was No Abuse of Discretion by the Court Below in Denying Appellants' Leave to Amend Their Complaint.

The complaint as filed on October 18, 1955, raised but a single issue of law—whether the transaction was within the scope of Section 5 of the Act. By the motion for leave to amend, belatedly tendered in the course of the hearing of the cause before the three-judge court, appellants sought to challenge the Commission's finding that the transaction was consistent with the public interest and to question the sufficiency of the supporting evidence of record. The issue before this court is whether the District Court abused its discretion by denying this motion.

Appellants had ample opportunity prior to final argument before the District Court to bring before the court all issues deemed by them to be pertinent. The court's denial of leave to amend is justified by the following circumstances: (1) counsel for appellants expressly stated that his failure to include these additional issues in the complaint as filed was not due to inadvertence or oversight, but reflected his deliberate choice; (2) counsel for appellants advised appellees shortly prior to the trial of the cause, as he also advised the District Court in a letter addressed to its Clerk, that the sole issue which he would present at the hearing was the jurisdictional issue; (3) counsel for appellants did not and could not plead unfamiliarity with the record since he represented appellants throughout the proceedings before the Commission; (4) the initial suggestion as to a prospective motion to amend was not forthcoming until the case was being heard; (5) when formal motion for leave to amend the

complaint was made after the case had been submitted, counsel for appellants expanded the proposed amendment so as to comprehend further elements not included in his original request; (6) the sole attempted justification advanced implied that appellants had lost confidence in the only issue raised by their original complaint and therefore had decided to raise additional issues. Their decision not to challenge the Commission's findings was advisedly made: if these findings had not been deemed by appellants to be fully supported by the record, there can be no doubt that the findings would have been challenged in the original complaint.

The sole reason of a substantive character offered in justification of appellants' proposed amendment was that appellants' counsel was influenced by the negotiation of a labor contract. However, the negotiation was undertaken in response to the mandate of the Commission and the fact of such negotiation expressly confirms the Commission's findings respecting the labor-management problem under existing conditions.

The policy respecting amendments cannot be so "liberal" as to frustrate the express Congressional intent to accomplish expedition in judicial review of orders of the Commission. Granting that there should be a liberal policy in permitting amendments, it does not follow that amendment should be allowed as of course and without good cause shown. Appellants' *seriatim* attack on the Commission's order is in direct conflict with the procedure specifically required by Congress in providing a special method for judicial review of orders of the Interstate Commerce Commission by which Congress sought to avert the delays ordinarily incident to litigation.

That the District Court exercised proper discretion finds further warrant in the prejudice which appellees would have

suffered had the amendments been allowed. The proposed amendments would necessarily have delayed final submission of the case for a substantial period of time. Had the amendments been allowed, the public, as well as Greyhound, would have been prejudiced by the extension, for an indefinite period, of the burdens and disadvantages resulting from what the Commission has termed "the impractical retention in a single entity of highly dissimilar operations" which, as the Commission adds, "causes the undesirable results shown by this record". The Interstate Commerce Commission itself would have been prejudiced by approval of a practice which would materially aggravate the burden resting upon the Commission in defending its orders.

It is well settled that motions to amend a pleading are within the sound discretion of the trial court, and upon this record there can be no warrant for finding an abuse of discretion on the part of the court below.

ARGUMENT

Introductory

The appeal in this cause raises only two issues: (1) Appellants' contention that the Commission did not have jurisdiction under Section 5 of the Act to approve the transaction; and (2) Appellants' contention that it was an abuse of discretion for the court below to deny the motion for leave to amend the complaint. Both of these contentions proceed from a misconception of Section 5 of the Act. This brief on behalf of appellees, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, will deal with these two issues in order.

I. The Court Below Has Correctly Decided That Acquisition of Control of Golden Gate by Pacific and by Greyhound Is a Transaction Within the Scope of Section 5 of the Interstate Commerce Act.

Appellants would carve out of Section 5 of the Act transactions which they describe as "split-ups", notwithstanding the absence of any statutory distinction between "split-ups" and other common control transactions. The terms of Section 5, a uniform line of Commission decisions and all pertinent reported court cases are opposed to appellants' construction of Section 5.

A. THE INTERSTATE COMMERCE ACT.

Appellants contend that the Commission does not have jurisdiction under Section 5 of the Act to authorize Pacific and Greyhound to acquire control of Golden Gate because Golden Gate is not presently an operating common carrier. The transaction approved by the Commission contemplates that Golden Gate will become an operating common carrier concurrently with the issuance of its capital stock whereby Pacific and Greyhound will acquire control of Golden Gate. The only jurisdictional question is whether Section 5 applies to an acquisition of control in cases where the corporation being controlled will become an operating common carrier concurrently with consummation of the transaction, but not before. In the terms of the statute, the question is whether the transaction constitutes an acquisition of control, "whether directly or indirectly", by "any carrier, or two or more carriers jointly, * * * of another through ownership of its stock or otherwise".

The authority exercised by the Commission in approving the transaction is derived from Section 5(2)(a) of the Act, which provides, *inter alia*, that it shall be lawful, with the approval and authorization of the Commission,

“ * * * for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * * ”

Congress has not only provided that approval of such a transaction by the Commission is required, but it has declared in plain and unambiguous language in Section 5(4) of the Act that:

“It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate * * * the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, * * * or in any other manner whatsoever.”*

Still more instructively, Section 5(11) of the Act declares that:

“The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or *resulting from any transaction approved by the Commission thereunder*, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; * * * ” (Emphasis supplied.)

The transaction approved by the Commission comes precisely within the terms and scope of Section 5. The juris-

*Appellants appear to recognize the pertinence of Section 5(4) of the Act since this portion of Section 5 is set forth in Section III of appellants' brief, under the caption “Statutes Involved” (p. 4). However, appellants' brief is otherwise lacking in any discussion of Section 5(4).

diction conferred by the statute expressly extends to any carrier or corporation "*resulting from any transaction approved by the Commission*", and any unauthorized acquisition of control of such carrier is unlawful "however such result is attained, whether directly or indirectly, * * * or in any other manner whatsoever." It is plain that Golden Gate will be a carrier "resulting" from the transaction here approved by the Commission and that Greyhound could not acquire control of Golden Gate without receiving prior authorization from the Commission. The Congress could not have found terms more aptly comprehending acquisition of control through what appellants have termed "split-ups". Advisedly, and necessarily, Congress left no such hiatus in the Commission's authority as is here urged by appellants.

In unmistakable terms, Section 5 makes it unlawful both for Golden Gate to engage in the contemplated services and for Greyhound to acquire control of Golden Gate until and unless such operations and acquisition of control have been authorized by the Commission. The court below correctly so held, stating succinctly:

"We have no difficulty in finding that the proposed transaction is covered by the language of the section; it merely says that approval of the Commission is required when one carrier acquires control of another. That is precisely what the Greyhound Corporation and Pacific are seeking to do here; although Golden Gate will not attain the status of a carrier until the operating rights of Pacific are transferred to it, neither will the parent corporations acquire control until then, for the properties and operating rights are to be simultaneously exchanged for the stock." (Tr. 113)

Greyhound's acquisition of control of Golden Gate would be concurrent with its becoming a carrier through consummation of the transaction. Golden Gate will be a carrier

"resulting" from the transaction authorized by the Commission, a carrier which Greyhound did not control prior to consummation of the transaction: Greyhound's acquisition of control of this new carrier would be in direct violation of Section 5(4) of the Act if, not approved and authorized by the Commission.

As noted by the court below, the main thrust of appellants' argument on the jurisdictional question is to the effect that the legislative history of Section 5 shows an intention to exclude so-called "split-ups" from Section 5. Neither the legislative history nor the terms of Section 5 lends support to appellants' contention.

Appellants have referred to portions of the legislative history of the Transportation Act of 1940 (54 Stat. 898); this legislation relieved the Commission of formulating a nationwide plan of consolidation and restored the initiative to the carriers. *Schwabacher v. United States*, 334 U.S. 182, 493 (1948). As they read this legislative history, it shows a Congressional purpose to promote only voluntary mergers and consolidations without at the same time giving the Commission jurisdiction over "split-ups". However, they are reading into this legislative history something which is not there. It is, of course, clear that the dominant purpose of the 1940 Act was to foster voluntary mergers and consolidations; but it does not follow that Congress thereby intended to deprive the Commission of jurisdiction over all forms of common control transactions, including so-called "split-ups". On the contrary, the Commission already had jurisdiction under Section 5, as amended by the Transportation Act of 1920, 41 Stat. 436, "regardless of state law, to control rate and capital structures, physical make-up and relations between carriers * * *". *Schwabacher v. United States*, 334 U.S. 182, 192² (1948). There is nothing

in the legislative history cited by appellants which even suggests that Congress intended, by the 1940 Act, to deprive the Commission of any portion of its jurisdiction over acquisitions of control. There is nothing in this history which detracts from the force of Section 5(4) of the Act by which unauthorized acquisitions of control are made unlawful, "however such result is attained, whether directly or indirectly, * * * or in any other manner whatsoever." This statutory language shows a clear Congressional purpose to confer upon the Commission jurisdiction over any and all forms of acquisitions of control *however such result is attained*. We have previously pointed out that Greyhound, as a result of the transaction herein, will acquire control of Golden Gate. This acquisition of control would be unlawful without the approval of the Commission for it is clear that Congress intended to include common control transactions within the sweep of the regulatory statute. In the words of the court below:

"* * * we think the plaintiff's version of Congressional purpose underlying Section 5 is too narrow, and that it ignores the whole regulatory scheme of the Interstate Commerce Act.

* * * * *

"So far as it was the purpose of congress to have the Interstate Commerce Commission control the capital structure, physical make-up and relations between carriers under the power conferred by Section 5, we are unable to read out of the statute the transaction at hand." (Tr. 113-4)

B. COMMISSION DECISIONS.

Without a single exception, the Commission in numerous cases has construed Section 5 to govern transactions comparable to the transaction herein. In its report and order

approving and authorizing the transaction, the Commission stated that:

"Jurisdiction is determined on the basis of facts existing at consummation, and Greyhound proposes to acquire control of Golden Gate concurrently with its becoming a carrier through the purchase. Jurisdiction has been asserted in numerous similar cases and is clear under Section 5." (Tr. 23)

This exercise of the Commission's jurisdiction under Section 5 is in conformity with a uniform line of Commission decisions covering a period of more than fifteen years preceding the ruling herein.* Subsequent Commission decisions authorizing comparable transactions have consistently applied the same principles.†

The Commission's exercise of jurisdiction herein is plainly authorized by the terms of Section 5, since Golden Gate will become a carrier concurrently with the acquisition of its control by Greyhound. This is a type of transaction specifically covered by Section 5(2) and within the prohibition of Section 5(4) of the Act, absent Commission approval. Such has been the long continued and generally unchallenged construction of Section 5 by the Commission. This

*During this period of more than fifteen years, the Commission has frequently and consistently made rulings in conformity with its report and order herein. The following are representative: *Columbia Motor Service Co.—Purchase*, 35 M.C.C. 531, 534 (1940); *Consolidated Freightways, Inc.—Control—Consolidated Convoy Co.*, 36 M.C.C. 358, 359 (1941); *Takin—Purchase*, 37 M.C.C. 626, 627 (1941); *A. & W. Motor Lines—Purchase*, 38 M.C.C. 407 (1942); *Interstate Motor Freight System, Inc.—Purchase*, 39 M.C.C. 207, 208 (1943); *Transit, Inc.—Purchase*, 50 M.C.C. 433, 434 (1948); *Gehlhaus and Hollobinko—Control*, 60 M.C.C. 167, 169 (1954); *Southern Pacific Company Reincorporation*, 267 I.C.C. 523 (1947).

†See, for example, *Mickow Corp.—Purchase*, 65 M.C.C. 541 (1955); *Colonial Fast Freight Lines, Inc.—Purchase*, 65 M.C.C. 619 (1956); and *Clark Transfer, Inc.—Purchase—Highway Express Lines, Inc.*, 70 M.C.C. 579 (1957).

Court has frequently stated that the contemporaneous construction of a statute by the agency charged with its administration, particularly if long continued as in this case, is entitled to great weight when the court on review is construing the statute in question.

United States v. Public Utilities Commission of California, 345 U.S. 295, 315 (1953) ;

United States v. American Trucking Associations, 310 U.S. 534, 549 (1940) ;

Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933) ;

United States v. Chicago North Shore R. Co., 288 U.S. 1 (1932) ;

Wisconsin v. Illinois, 278 U.S. 367, 413 (1929).

As aptly stated by Mr. Justice Cardozo in the *Norwegian Nitrogen* case, "True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." (288 U.S. at 315)*

C. COURT DECISIONS.

The Commission's exercise of its jurisdiction under Section 5 in approving and authorizing the transaction whereby Greyhound would acquire control of Golden Gate is not only consistent with a uniform line of Commission decisions

*Appellants seem to suggest that Commission decisions have some infirmity in cases where there were no protestants (Brief of appellants, pp. 38-9). This implied criticism of the Commission hardly seems justified since the Commission is charged with the duty to protect the public interest and in discharging this duty it must necessarily endeavor to remain within jurisdictional limitations prescribed by Congress. Furthermore in many of the cases forming the uniform line to which we have referred, opposing parties were represented by counsel and the jurisdictional issue was fully argued in advance of its submission to the Commission for decision.

but also accords with decisions of this Court construing Section 5 of the Act. These decisions, commencing with *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932) to and including the latest case, *Alleghany Corporation v. Breswick & Co.*, 353 U.S. 151 (1957), cover a period of more than 25 years and fully support the ruling of the Commission and the judgment entered by the court below.

The *New York Central Securities Corp.* case held that Commission approval under Section 5 was required where the transaction was a lease to the parent corporation of the properties of its subsidiary. This court held that there was an acquisition of control even though the parent was already in control of the carrier properties through its ownership of the capital stock of the subsidiary and the transaction represented merely a change in the form of control. Twelve years later in *United States v. Marshall Transport Co.*, 322 U.S. 31 (1944), this Court again construed the common control provisions of Section 5 of the Act. The transaction which was there held to be subject in its *entirety* to the jurisdiction of the Commission under Section 5(2) was the acquisition of the property and franchises of one carrier by another carrier, which was in turn controlled by a non-carrier. The Commission's conclusion that this transaction involved the acquisition of control of the first or vendor-carrier by the non-carrier parent of the vendee, was upheld. See, also, *McLean Trucking Co. v. United States*, 321 U.S. 67, 78-83 (1944) where this Court, in a case which involved the acquisition of control of eight motor carriers and consolidation of their operating rights into one surviving carrier, traced the history of Section 5 of the Act, with particular reference to its application to motor carriers.

The next decision in this series is *Schwabacher v. United States*, 334 U.S. 182 (1948), which involved the authority of the Commission over the rights of dissenting shareholders in a merger transaction. In *Schwabacher* this Court referred to a series of decisions construing Section 5 of the Act, as amended by the Transportation Act of 1920, 41 Stat. 456, summarizing these decisions as follows:

"The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, *regardless of state law*, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system [Citations omitted]." (334 U.S. at 192) (Emphasis supplied.)

Last Term once again this Court was asked to construe "acquisition of control" as that term appears in Section 5. *Alleghany Corporation v. Breswick & Co.*, 353 U.S. 151 (1957) held that a rearrangement within a railroad system constituted an "acquisition of control" under Section 5(2) of the Act. The Commission had jurisdiction to approve or disapprove such rearrangement within a railroad system notwithstanding the fact that the parents already controlled the subsidiary and the transaction represented only a change in the form of control. In the *Alleghany Corporation* case this Court said:

"In 1939, in *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 145-146, arising under the Federal Communications Act, 48 Stat. 1064, 1065, 47 U.S.C. §152(b), this Court rejected artificial tests for 'control', and left its determination in a particular case as a practical concept to the agency charged with enforcement. This was the broad scope designed for 'control' as employed by Congress in the Transportation Act of

1940, 54 Stat. 899-900, 49 U.S.C. § 1(3)(b). See *United States v. Marshall Transport Co.*, 322 U.S. 31, 38.

"Not labels but the nature of the changed relation is crucial in determining whether a rearrangement within a railroad system constitutes an 'acquisition of control' under § 5(2)." (353 U.S. at 163-4, 166)

The plain language of Section 5 and this series of decisions make it abundantly clear that the Commission had full authority to approve and authorize the transaction and that the transaction could not be accomplished without such prior approval. Under the broad scope designed for "control" as employed by Congress and in order to control capital structures, physical make-up and relations between carriers, manifestly the Commission must have authority over a carrier's acquisition of control of another carrier which becomes such concurrently with consummation of the transaction. Any unapproved acquisitions of such control would violate Section 5(4) of the Act. A distinction between "split-ups" and other common control transactions would be artificial, would be without foundation in the statute and would be directly in conflict with this series of decisions of this Court.

Another series of decisions gives further emphasis to the conclusion that appellants' challenge to the jurisdiction of the Commission cannot be sustained. Section 408 of the Civil Aeronautics Act, 49 U.S.C. § 488, as noted by the court below, is comparable to Section 5 of the Interstate Commerce Act, both provisions being directed to a common objective. Appellants here contend that the transaction is not within the scope of Section 5 because Golden Gate is not yet an operating common carrier. In *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F.2d 810 (C.A.

2d 1941) the identical issue was raised respecting the jurisdiction of the Civil Aeronautics Board. Application was made to the Civil Aeronautics Board for a certificate to permit a newly organized corporation to engage in operations as an air carrier and for an order authorizing control of such air carrier by American Export Lines, Inc., a common carrier by water. The Board dismissed the application for approval of control for reasons similar to the theory advanced by appellants herein, the Board having reached the conclusion that the statute applied only to cases where the acquisition of control occurred at a time when the corporation was already an air carrier. A unanimous court of appeals refused to interpret so narrowly the common control provisions of the Civil Aeronautics Act, stating by Judge Augustus N. Hand:

"This seems to us an unduly literal interpretation of subdivision (5). In our opinion 'to acquire control of any air carrier in any manner whatsoever' is to take all steps involved in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources, with a certificate authorizing operation. Any other interpretation would enable a steamship company, by organizing a subsidiary for air carriage, to escape the requirement of Section 408(b) that the 'Authority shall not enter * * * an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition'." (p. 815)

The decisions in *National Air Freight Forwarding Corp. v. Civil Aeronautics Board*, 197 F.2d 384 (C.A. D.C. 1952) and *Continental Southern Lines, Inc. v. Civil Aeronautics*

Board, 197 F.2d 397 (C.A. D.C. 1952) cert. den., 344 U.S. 831, are in accord and expressly follow the *Pan American* decision.

Appellants seek to distinguish these Civil Aeronautics Act cases on the basis of immaterial differences in statutory terms and purported differences in "legislative philosophy". Their effort is, to say the least, unpersuasive. Irrespective of any differences in emphasis or approach in general, the fact is that the common control provisions of the Civil Aeronautics and Interstate Commerce Acts are in all material respects comparable and are both directed to a common objective. Appellants point to the following proviso in Section 408 of the Civil Aeronautics Act* and urge that it serves to distinguish the Civil Aeronautics Act cases (Brief of appellants, p. 42):

"Provided further, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition."

But this proviso, only part of which was quoted by appellants, refers to the person *acquiring* control rather than the person *being controlled*. Thus, it does not furnish a basis for distinguishing the Civil Aeronautics Act cases where the issue concerned the carrier status of the person being controlled, rather than the status of the controlling carrier.

*See Appendix, pp. 6-9, for the full text of Section 408.

The same issue—the carrier status of the person being controlled—is presented in the case at bar.*

D. THE POTENTIAL JURISDICTIONAL VOID.

The dangers implicit in appellants' theory of the limited scope of Section 5 have been recognized by this Court in rejecting any such interpretation of the meaning of "acquisition of control". In *Alleghany Corporation v. Bréswick & Co.*, 353 U.S. 151 (1957), it was said with respect to common control transactions that the crucial issue is "not the immediacy or remoteness of the parent from the proposed transaction, for, as we said in the *Marshall Transport* case, the parent can always, by operating through subsidiaries, make itself more remote." (p. 169) The Court continued:

"Denial of power to the Commission to regulate the elimination of the Jeffersonville from the national transportation scene would be a disregard of the responsibility placed on it by Congress to oversee combinations and consolidations of carriers and 'to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * * and the further requirements that 'All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.' National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding § 1." (pp. 170-1)

Similarly, the Court of Appeals for the District of Columbia Circuit in *National Air Freight Forwarding Corp. v. Civil Aeronautics Board*, 197 F.2d 384, *supra*, has warned against unduly restricting the Congressional dele-

*Appellants also contend that "There is no comparable provision in Section 5 of the Interstate Commerce Act" (Brief of appellants, p. 42). However, the two acts are comparable even in this respect. See Sections 5(2) (b) and 5(3), Appendix, pp. 2-3.

gation of regulatory jurisdiction in the field of capital structures and inter-carrier relationships. Addressing itself specifically to the opportunity which would be afforded for successful evasion of the statutory objective if the agency's authority were to be restricted to common carriers presently existing, excluding carriers "resulting" from transactions submitted for the agency's approval, the court said:

"Since such a company is not an air carrier until a certificate has been issued, it would appear at first blush that its relationships to other types of carriers are not subject to the restriction of § 408. It has been held, however, in *Pan American Airways Co. v. Civil Aeronautics Board*, 2 Cir., 1941, 121 F.2d 810, that the very process of certification brings the control relationships between the newly certificated air carrier and its parent within § 408. Otherwise a common carrier seeking entry into the air transportation field would be able to evade § 408 merely by organizing a subsidiary and causing it to apply for a certificate of public convenience and necessity under § 401. We agree with the Pan-American decision that it would be unwise for the Board to close its eyes to the fact that with completion of the certification process, there would be in existence an air-surface carrier control relationship which important segments of the Act were designed to regulate." (197 F.2d at 386)

The Interstate Commerce Commission has also shown an awareness of such problems. The Commission has repeatedly called attention to dangers of this character.*

*The Commission's statement in *Raymond Bros. Motor Transportation, Inc.—Purchase*, 37 M.C.C. 431, 433 (1941), is typical:

"Where, as in the instant case, a transaction involving purchase of the properties of a motor carrier is subject to the requirements of section 5, no part of such transaction may be lawfully consummated without our prior approval. To find otherwise would leave carriers free, especially in cases where

In an effort to close this void in the regulatory structure which would necessarily arise from adoption of their theory, appellants argue that the Commission should have acted under the limited jurisdiction conferred by Section 212(b) of the Act, 49 U.S.C. § 312(b). Appellants' suggestion is ill advised. Section 212(b), *by its terms*, is made expressly inapplicable to a transaction governed by Section 5 of the Act. As has already been demonstrated, and as both the Commission and the court below have held, this record presents a transaction within the Scope of Section 5 and therefore is governed by Section 5 rather than by Section 212(b). The latter section merely authorizes, subject to such rules and regulations as the Commission may prescribe, the transfer of any certificate or permit authorizing interstate operations. But the transaction herein includes more than a mere transfer of a certificate authorizing operations; acquisition of control of Golden Gate is the crucial element which makes the transaction subject to Section 5. As previously pointed out, the control of Golden Gate could not lawfully be acquired without an appropriate order made under Section 5. Appellants have receded from their original representation that this holding by both the Commission and the court below renders Section 212(b) "completely

their operations duplicate each other, or are substantially duplicate, to secure a monopoly, without the necessity of our first considering the desirability of the transaction in the public interest, merely by the device of acquiring the intrastate rights and physical properties of a vendor motor carrier (or several vendors), the latter agreeing to abandon operations in interstate or foreign commerce." (p. 433)

See, also, the following Commission decisions illustrating the detrimental consequences if jurisdictional voids were to be created in this field: *Wilson Storage and Transfer Co.—Purchase*, 36 M.C.C. 221, 227 (1940); *Texas, New Mexico and Oklahoma Coaches, Inc.—Purchase*, 55 M.C.C. 269, 275 (1948); *Mooney—Control*, 56 M.C.C. 771, 781 (1950), 60 M.C.C. 103 (1954); *Bekins—Control*, 65 M.C.C. 56, 59 (1955).

meaningless" (Juris. st., p. 14). As appellants now recognize, Section 212(b) has direct application to all transfers which, because not more than twenty motor vehicles are involved in the transaction, are exempt under Section 5(10) of the Act. See *United States v. Resler*, 313 U.S. 57 (1941). But appellants now contend that Section 212(b) "would be deprived of any significant meaning" (Brief of appellants, p. 35) under the decision of the Commission and the court below.* That this is not so is illustrated by *Atwood's Transport Line—Lease—John A. Clarke*, 52 M.C.C. 97 (1950), cited by appellants at page 35 of their brief, where the Commission said:

"For those small carriers desiring to effect the transfer of a certificate or permit from one to the other, a specific exemption was provided in section 5(10), and other transfers of a certificate from a carrier to a person, not a carrier and not affiliated with a carrier, are not subject to Section 5. The intent of the Congress obviously was to provide a means whereby such transfers could be effected easily and without delay under such rules as the Commission deemed appropriate." (Emphasis supplied.)

Thus there is a significant area in which Section 212(b) rather than Section 5, applies. However, the transaction approved by the Commission in the case at bar includes more than a mere *transfer of a certificate* from a carrier to a person not a carrier and not affiliated with a carrier; as we have pointed out the transaction involves an *acquisition of control* in addition to a transfer of a certificate. For that reason Section 5 applies to the transaction which may appropriately be described as "the control of two or

*They have now gone even farther afield in citing Section 312 of the Act, relating to water carriers, a section which has not previously been cited and which has no relevance to this case.

more carriers of sufficient size to be subject to section 5, where the transfer of a certificate may be involved." *Atwood's Transport Line—Lease—John A. Clarke, supra*, 52 M.C.C. at 108. There is thus no inconsistency between the *Atwood's Transport* case and the other Commission decisions discussed in Section B above, page 19.*

E. THE EXCLUSIVE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.

When an order has been made in accordance with Section 5 of the Act, rested upon findings that the transaction complies with the exacting standards of Section 5, it conveys authority permitting such transaction to be carried into effect "without invoking any approval under State authority"; the Commission's authority is expressly declared by the terms of Section 5(11) of the Act to be "exclusive and plenary".

Seaboard Air Line Railroad Co. v. Daniel, 333 U.S. 118 (1948);

Schwabacher v. United States, 334 U.S. 182 (1948);

Thompson v. Texas Mexican Railway Co., 328 U.S. 134 (1946).

Of necessity, when interstate and intrastate services and transactions are related and commingled, the federal authority over both is complete and paramount. As said by this Court in *Houston East & West Texas Railway Co. v. United States*, 234 U.S. 342, 351-2 (1914):

*Appellants seem to gain some comfort from the circumstance that the application herein included a prayer for authorization in the alternative under Section 5 or under Section 212(b). The fact is that the reference to Section 212(b) appears in the Commission's standard form prescribed for such applications, the purpose being to provide for cases, such as *A. W. Hackins, Inc.—Purchase—Disher*, 70 M.C.C. 673 (1957), where there might be a question respecting the application of the exemption granted by Section 5(10) of the Act.

"The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

The essential supremacy of federal power when interstate and intrastate services are "inextricably intertwined" is well exemplified by this Court's decision in *Colorado v. United States*, 271 U.S. 153 (1926). Upon application of a carrier the Interstate Commerce Commission had authorized, under Section 1, paragraphs 18-20 of the Act, abandonment of a branch line of railroad lying wholly within the State of Colorado and operating in both intrastate and interstate commerce. We may note that the statute does not refer in terms to intrastate commerce. The applicable provision (paragraph 18) simply sets forth that no carrier by railroad "shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." The State of Colorado brought suit to enjoin the Commission's order but the bill was dismissed by the District Court. Upon appeal to this Court the State contended *inter alia* as follows:

"The Interstate Commerce Commission is without power to authorize the abandonment, as respects intrastate business, of a line of railroad wholly within a State, which is owned and operated by a corporation of that State;" (p. 155)

However, the Supreme Court affirmed the judgment of the District Court, without dissent. The opinion was by Mr. Justice Brandeis. The following excerpts from the opinion are pertinent here:

"This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole."

* * * * *

"Because the same instrumentality serves both, Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission."

* * * * *

"The sole test prescribed is that abandonment be consistent with public necessity and convenience. In deter-

mining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both." (271 U.S. at 164-166, 168)

Appellants' reliance, at pages 32 and 33 of their brief, upon the decision of this Court in *Chicago, M., St. P. & P. R. Co. v. State of Illinois*, 355 U.S. 300 (1958), is misplaced. That decision does not aid these appellants. The *Milwaukee Road* case arose upon an order of the Interstate Commerce Commission, made pursuant to Section 13(4) of the Act, authorizing an increase in rates "for suburban commuter service in the Chicago area * * *." The instant case, on the other hand, arises under Section 5 of the Act and the Commission has made no order, under Section 13(4) or otherwise, prescribing rates. Neither directly nor indirectly has the Interstate Commerce Commission here undertaken to fix or determine rates for intrastate service or otherwise. Under the transaction found by the Commission to be consistent with the public interest, *Golden Gate's* intrastate rates would continue to be subject to the regulatory jurisdiction of the California Public Utilities Commission to the same extent as at present (Tr. 29). Furthermore, even if the principles of the *Milwaukee Road* case could be deemed applicable to the instant case, the material facts are in no respect in parallel. In approving the *Golden Gate* transaction, the Commission has not failed to consider Greyhound's entire intrastate operations. On the contrary, the Commission found that at a time when, according to the actual findings of the California Public Utilities Commission, Pacific was operating under fares producing an estimated annual loss of \$1,202,200 from its overall intrastate operations and a loss of \$389,800 from its Marin County operations, the Cali-

California Public Utilities Commission authorized merely a token increase which was to produce only \$84,000 in additional revenue (Tr. 17-20, 28). The Interstate Commerce Commission said in its report herein: " * * * we may not properly overlook the burden on the interstate operations of Pacific which the proposed transaction would alleviate" (Tr. 28). Thus the Commission took into account the results of Greyhound's entire intrastate operations as one of the circumstances warranting its concluding that the transaction was consistent with the public interest.*

The Commission has correctly determined that the Golden Gate transaction is within the terms and scope of Section 5 and properly exercised its "exclusive and plenary" jurisdiction in approving and authorizing the transaction.

II. There Was No Abuse of Discretion by the Court Below in Denying Appellants Leave to Amend Their Complaint.

We have previously pointed out that the complaint as filed raised but a single issue of law—whether the transaction was within the scope of Section 5 and therefore sub-

*Appellants' "supplemental" brief with its attachment is not worthy of the dignity of passing notice. With respect to *Columbia Motor Service Co.—Purchase*, 35 M.C.C. 531 (1940), which appellants therein seek to distinguish, the following chronology may have some significance: (1) Date of Missouri Public Service Commission Order in Case No. T-7335—April 29, 1940; (2) Date of Interstate Commerce Commission report approving Columbia Motor Service transaction—June 12, 1940; (3) Date of enactment of Transportation Act of 1940 (54 Stat. 898)—September 18, 1940. For whatever reasons the parties to the Columbia Motor Service transaction sought approval for the transfer of operating rights first from the State and thereafter from the federal authority as well, the significant facts are: *first*, that the parties sought and received from the Interstate Commerce Commission authority approving the transaction *in its entirety*; and, *second*, that the order of the State Commission was issued prior to the enactment of the present Section 5(11) of the Act containing the "exclusive and plenary" clause. Thus, the parties' prior resort to, and the action by, the Missouri Commission have no relevance whatever to the issue before this Court.

ject to the exclusive and plenary jurisdiction of the Commission. In words excerpted from appellants' brief (p. 13):

"The single ground on which the complaint challenged the validity of the order was that the proposed transactions did not come within the scope of Section 5 of the Interstate Commerce Act (R. 6-7)."

By the motion for leave to amend, appellants requested permission to add new allegations challenging the Commission's finding that the transaction was consistent with the public interest, challenging many subsidiary findings which were alleged to be without record support, and charging the Commission with an abuse of discretion in denying appellants' petition for rehearing and reconsideration. The motion for leave to amend was denied, and the sole resulting issue now before this Court is whether the District Court abused its discretion by such denial.

A. APPELLANTS HAD AMPLE OPPORTUNITY PRIOR TO FINAL ARGUMENT BEFORE THE DISTRICT COURT TO BRING BEFORE THE COURT ALL ISSUES DEEMED BY THEM TO BE PERTINENT.

The Commission's order was entered on July 6, 1955 and appellants filed their complaint seeking annulment of that order on October 18, 1955. Appellees had answered the complaint, intervening appellees had requested and obtained permission to intervene, the three-judge court had been convened, the motions directed to the complaint had been filed, the time for hearing thereon scheduled by the court, and counsel for the United States and the Commission had come to San Francisco from Washington, D.C.—all without any indication that appellants intended to request permission to amend the complaint. Counsel for appellants had even advised the court and appellees that the sole issue which he would present at the hearing was the jurisdictional issue. In fact, appellants had conceded that the case

was ready for final judgment by making their own motion for judgment on the pleadings, which was heard concurrently with the motions of appellees. The initial suggestion or indication that appellants might desire to ask leave to amend was made in the course of final argument on the motions to dismiss and for judgment on the pleadings on February 23, 1956. The actual motion for leave to amend the complaint was made after the only issue raised by the complaint had been submitted for decision. Appellants admitted that the proposed amendment related to issues known to them when the complaint was filed and that the failure to raise these issues was not due to inadvertence or oversight; the only explanation offered of record was that appellants' counsel had reappraised his case and now desired to make such a sweeping challenge to the basic findings made by the Commission. Appellants renew this same explanation (Juris. st., p. 18; Brief of appellants, pp. 19-20, 45).

The mere statement of the undisputed facts bearing upon this unusual last minute request establishes without question that the court below was manifestly justified in denying the motion, after having given appellants full opportunity to present any reasons they may have had in support of their request for leave to amend. The sole justification advanced implies that appellants had lost confidence in the only issue raised by their original complaint and therefore had decided to raise additional issues. The same attempted justification has now again been offered (Juris. st., p. 18; Brief of appellants, pp. 19-20, 45). When the complaint herein was filed, appellants' counsel was thoroughly familiar with the record before the Commission, having represented appellants during the entire proceedings. The appellants' decision not to challenge the Commission's findings was advisedly made. If there had been the remotest chance that

these findings were not fully supported by the record, it is inconceivable that appellants' counsel would have omitted to challenge them in the original complaint.

B. APPELLANTS HAVE ADVANCED NO SUBSTANTIVE REASON INDICATIVE OF NECESSITY TO AMEND THEIR COMPLAINT.

The sole reason of a substantive character offered by appellants in justification of their proposed amendment is, that appellants' counsel was influenced by the negotiation of a labor contract between Pacific Greyhound and the Union alleged to be contrary to one of the Commission's public interest findings (Juris. st. p. 18; Brief of appellants, pp. 52-53). This suggestion can hardly be taken seriously since the fact of such negotiation does not contradict but expressly confirms the Commission's findings respecting the difficulties engendered in dealing with labor problems under existing conditions (Tr. 21, 29, 102). Moreover, the negotiation of this contract was undertaken and accomplished in response to the mandate of the Commission and in conformity with the policy of Section 5(2)(f) of the Act requiring protective conditions for labor. In its report herein, the Commission stated that: "Our approval of the transaction is with the expectation that applicants and the Union will make every effort to reach an agreement to protect all employees of Pacific and Golden Gate affected by the transaction, * * *" (Tr. 29). In our view, this suggestion on the part of appellants does not arise above the dignity of pretext; obviously appellants' prime objective was further delay, and for an extended period.

C. THE POLICY RESPECTING AMENDMENTS CANNOT BE SO "LIBERAL" AS TO FRUSTRATE THE EXPRESS CONGRESSIONAL INTENT TO ACCOMPLISH EXPEDITION IN JUDICIAL REVIEW OF ORDERS OF THE COMMISSION.

All of the factors to be considered by the court in exercising its discretion pursuant to Rule 15, Federal Rules of Civil Procedure, militated heavily against the motion for leave to amend.* There was no abuse of discretion in the court's denial of appellants' belated request for permission to challenge the Commission's findings upon the additional grounds set forth in the proposed amended complaint, no showing having been made to warrant appellants' *seriatim* attack on the Commission's order. Granting that there should be a liberal policy in permitting amendments, it does not follow that amendments should be allowed as of course and without good cause shown. While appellants' brief purports to disparage what is termed "The 'shotgun approach' of pleading a multiplicity of issues 'for good measure rather than for good reason'" (Brief of appellants, p. 52), it is plain that appellants' proposed amendment reflects this "shotgun approach" and would give rise to a multiplicity of issues requiring a formidable enlargement of the time required to hear and determine the case. The policy respecting amendments should not ignore the plain intent of Congress in providing for expedition in judicial review of orders of the Interstate Commerce Commission.

*The following are some of the cases justifying denial of appellants' motion for leave to amend their complaint: *In re Hudson & Manhattan R. Co.*, 229 F.2d 616, 621 (C.A. 2d, 1956), *cert. den.*, 351 U.S. 982; *Calhoun County v. Roberts*, 148 F. 2d 901, 903-4 (C.A. 5th 1945); *Schaad v. New York Life Ins. Co.*, 79 F. Supp. 463, 468 (E.D. Tenn., 1948); *Hart v. Knox County*, 79 F. Supp. 654, 658 (E.D. Tenn., 1948); *Friedman v. Transamerica Corp.*, 5 F.R.D. 115, 116 (D. Del., 1946); *Redmond v. O'Sullivan Rubber Co.*, 10 F.R.D. 536, 538 (W.D. Va., 1944); *Schick v. Finch*, 8 F.R.D. 639, 640 (S.D. N.Y., 1944).

Appellants seek to find an analogy between a complaint in ordinary litigation and a complaint seeking review and annulment of an order of the Interstate Commerce Commission. Thus it is said upon page 19 of the brief of appellants that "For all practical purposes, the situation is the same as if a plaintiff sought to amend his complaint after a ruling that he had not alleged facts sufficient to state a cause of action." (See also a suggestion to the same effect upon page 45 of the brief of appellants.) But the attempted analogy is wholly unwarranted since procedural practices in conventional litigation cannot be assimilated to the procedure specifically required by Congress in providing a special method for judicial review of orders of the Interstate Commerce Commission under the terms of the Urgent Deficiencies Act. (28 U.S.C. §§ 2321 to 2325). Congress has directed that, in disposing of complaints seeking review and annulment of orders of the Interstate Commerce Commission, the cases shall be speedily determined. Thus in *United States v. Griffin*, 303 U.S. 226 (1938), the Supreme Court said, speaking through Mr. Justice Brandeis, that "upon both the trial court and the Supreme Court rests the obligation to give the case precedence over others" and that, in providing for this special type of judicial review, Congress sought "*to avert the delays ordinarily incident to litigation.*" (pp. 232-233) (Emphasis supplied.) It should be obvious that the circumstances confronting the District Court when appellants sought leave to amend their complaint have nothing in common with an ordinary case in which a plaintiff seeks for the first time to state the cause of action. Rather the instant case is one in which appellants are seeking to change the theory of their cause of action. This is not permissible in a case seeking annulment of an order of the Interstate Commerce Commission by a court specially con-

stituted under the terms of the Urgent Deficiencies Act. A more appropriate analogy would be to appeals in the course of which appellant may not be allowed to change his theory. See *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. United States*, 322 U.S. 1 (1944); *Helvering v. Wood*, 309 U.S. 344 (1940).

D. THAT THE DISTRICT COURT EXERCISED PROPER DISCRETION FINDS FURTHER WARRANT IN THE PREJUDICE WHICH APPELLEES WOULD HAVE SUFFERED HAD THE AMENDMENT BEEN ALLOWED.

We cannot too strongly emphasize the delay in the proceedings of the District Court which would inevitably have resulted if applicants had been permitted to amend their complaint in accordance with their singularly belated proposal. Appellants' suggestion that "The amendment would not have delayed final submission of the case for any long period of time * * *" is incredible (Brief of appellants, pp. 20-21). The fact is that the record before the Interstate Commerce Commission was not then available for presentation to the court. It would therefore have been necessary to await the production of a certified copy of the record from the Commission. Thereupon steps would be taken to reconvene the statutory three-judge court, counsel for the Interstate Commerce Commission and the United States would be under the necessity of returning to San Francisco from Washington, D.C., and then, upon receipt of the record, the court would proceed to determine whether there was merit in any of the contentions of appellants as to lack of support for the Commission's findings. This could not be accomplished in superficial fashion; the required task is inherently time-consuming. After full hearing new briefs would be filed, doubtless supplemented by oral argument, and the case would be submitted upon the expanded record. We need not speculate as to the time required to enable the

District Court to act advisedly in response to the multiplied issues and the expanded record. It will suffice to observe that it would be formidable. By the same token, if this Court were to remand the case at this time to the District Court with instructions to allow the requested amendments, not less than two additional years might well elapse before this case could be brought to a conclusion. In conjunction with the time already passed, the aggregate might well reach five years. Surely this would plainly disregard the Congressional intent in providing for expedition in judicial review of the Commission's orders under the provisions of the Urgent Deficiencies Act.

Appellants have already succeeded in delaying action under authority of the Commission's order for a period now approaching three years. It would seem that this litigation has already consumed excessive time and that to delay it further would be directly in derogation of the express intent of Congress in providing for speedy judicial review of orders of the Interstate Commerce Commission. It is suggested in the dissenting opinion below that "no defendant will suffer any substantial prejudice by permitting plaintiffs to amend their complaint". (Tr. 123). This observation is plainly in error. Greyhound has suffered a delay approaching three years in undertaking to avail itself of the authority granted by the Commission's order for corporate reorganization. It is still burdened with what the Commission has termed "the impractical retention in a single entity of highly dissimilar operations" which, as the Commission adds, "causes the undesirable results shown by this record" (Tr. 27). To extend these burdens and disadvantages for an indefinite period in the future certainly means "substantial prejudice" and this is prejudice to the public, no less than to the carrier, and in derogation of the

National Transportation Policy, as the Commission has determined. More than this, the Interstate Commerce Commission itself would suffer "substantial prejudice" by a ruling of our highest Court giving sanction to a *seriatim* attack upon the Commission's orders, permitting litigants to limit complaints to a single issue with freedom to amend, upon the trial of the cause several months thereafter, so as to multiply the grounds of attack. Approval of such a practice would materially aggravate the burden resting upon the Commission in defending its orders and would set at naught the Congressional intent for expedition in the processes of judicial review.

Presumptively we are not under the necessity of taking further note of the "concurring and dissenting opinion" below since enough has been said heretofore to answer its substance. Herein there are no "circumstances" which could remotely serve to sanction the proposed amendments "in the exercise of a sound and liberal discretion." We feel warranted in observing that the dissenting opinion seems to imply that it was the duty of the court to act virtually as an appellate Interstate Commerce Commission, with freedom to disapprove the conclusions of the Commission that the proposed transfer of certain transportation properties and services in the San Francisco Bay area to a separate subsidiary corporation would be in the public interest. We are confident that this Court will not conclude that the District Court was sitting virtually as an appellate administrative tribunal with freedom to substitute its judgment for the judgment of the Commission as to what is required, in the public interest, in dealing with corporate structures of common carriers, under applicable statutory provisions and in furtherance of the National Transportation Policy. This is within the exclusive province of the Commission.

It is well settled that motions to amend a pleading are within the sound discretion of the trial court, and upon this record there can be no warrant for finding an abuse of discretion on the part of the District Court in denying appellants permission to amend their complaint.

CONCLUSION

For the reasons herein set forth, the judgment below should be affirmed.

Respectfully submitted,

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Of Counsel

Dated at San Francisco, California, March 31, 1958.

(Appendix Follows)

Appendix

INTERSTATE COMMERCE ACT

Section 5 (49 U.S.C. § 5, 1952 Ed., Vol. 5, pp. 7116-7118)

"§ 5. Combinations and consolidations of carriers

"(2) Unifications, mergers and acquisitions of control.

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this section—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

"(b) Whenever a transaction is proposed under subparagraph (a) of this section, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in

case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

“(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(3) Noncarrier deemed carrier upon acquiring control.

"Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of this section, to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Sections 20(1)—(10), 304(a) (1) and (2), 320 and 913 of this title, (which relate to reports, accounts, and so forth, of carriers), and sections 20a(2)—(11), and 314 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of sections 20a and 314 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

"(4) Control effected by other than prescribed methods.

"It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subparagraph (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall

be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words 'control or management' shall be construed to include the power to exercise control or management.

"(5) Transactions deemed to effectuate control or management.

"For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

"(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

"(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

"(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

"(10) Unifications, consolidations, etc., of motor carriers only.

"Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) of this section where the only parties to the transaction are motor carriers subject to chapter 8 of this title (but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1(3) of

this title), and where the aggregate number of motor vehicles owned, leased, controlled, or operated by such parties, for purposes of transportation subject to chapter 8 of this title, does not exceed twenty.

* * * * *

“(11) *Plenary nature of authority under section.*

“The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder; shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but

any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

Section 212(b) (49 U.S.C. § 312(b), 1952 Ed., Vol. 5, p. 7191)

"§ 312. *Suspension, change, revocation and transfer of certificates, permits, and licenses.*

"(b) Except as provided in section 5 of this title, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe."

CIVIL AERONAUTICS ACT

Section 408 (49 U.S.C. § 488, 1952 Ed., Vol. 5, pp. 7222-7223)

"§ 488. *Consolidation, merger, and acquisition of control.*

"(a) It shall be unlawful, unless approved by order of the Board as provided in this section—

"(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

"(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

"(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

"(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics:

"(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever:

"(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

"(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

"(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided*, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition.

tion of control: *Provided further*, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.

“(c) The provisions of this section and section 489 of this title shall not apply with respect to the acquisition or holding by any air carrier, or any officer or director thereof, of (1) any interest in any ticket office, landing area, hangar, or other ground facility reasonably incidental to the performance by such air carrier of any of its services, or (2) any stock or other interest or any office or directorship in any person whose principal business is the maintenance or operation of any such ticket office, landing area, hangar, or other ground facility.

“(d) Whenever, after the effective date of this section, a person, not an air carrier, is authorized pursuant to this section, to acquire control of an air carrier, such person thereafter shall, to the extent found by the Board to be reasonably necessary for the administration of this chapter, be subject, in the same manner as if such person were an air carrier, to the provisions of this chapter relating to accounts, records, and reports, and the inspection of facilities and records, including the penalties applicable in the case of violations thereof.

“(e) The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Board finds after such hearing that such person

is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision."

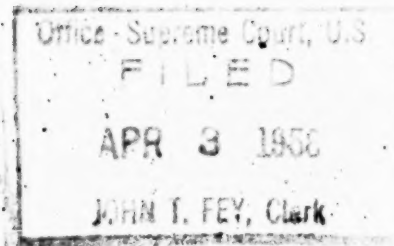
FEDERAL RULES OF CIVIL PROCEDURE

Rule 15 (28 U.S.C. following § 2072, 1952 Ed., Vol. 3, p. 4306).

"(a) Amendments.

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

LIBRARY
SUPREME COURT, U. S.



No. 415

In the Supreme Court of the United States

OCTOBER TERM, 1957

COUNTY OF MARIN, ET AL., APPELLANTS

v.

**UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, ET AL.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA**

**BRIEF FOR THE UNITED STATES AND THE INTERSTATE
COMMERCE COMMISSION**

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In the Supreme Court of the United States

OCTOBER TERM, 1957

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OPINIONS BELOW

The opinions of the district court (R. 111, 119) are reported at 150 F. Supp. 619. The report of the Interstate Commerce Commission (R. 8) is reported at 65 M. C. C. 347.

JURISDICTION

The final judgment of the district court was entered on May 3, 1957 (R. 124-125). Notice of appeal was filed on May 29, 1957 (R. 126-128). Probable jurisdiction was noted on November 12, 1957. (355 U. S. 866). The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b).

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 43-46.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission has jurisdiction under Section 5 of the Interstate Commerce Act to authorize an interstate motor carrier to transfer part of its intrastate and interstate operating rights to a noncarrier, which thereupon would become a carrier, and, in exchange, concurrently acquire control of the latter company through acquisition of its stock.

2. Whether it was an abuse of discretion for the district court to deny a motion to amend the complaint in order to challenge the Commission's findings, where the complaint had raised only the jurisdictional question, where the first indication that such an amendment would be sought was during oral argument of that question, and where there was no showing of lack of knowledge, mistake, or inadvertence on appellants' part.

STATEMENT

Involved in this proceeding are the suburban-commuter operating rights of the Pacific Greyhound Lines ("Pacific"), together with certain closely related interstate operating rights. These operating rights, which Pacific seeks permission to transfer to a separate but wholly-owned subsidiary company, represent 3.08 percent of Pacific's total route miles, account for 7.44 percent of its bus miles operated.

produce 9.16 percent of its gross passenger revenue, and account for 35.49 percent of the total passengers transported by Pacific (R. 11). Under the proposed transaction, Golden Gate Transit Lines ("Golden Gate"), which was incorporated on May 7, 1953, would acquire these operating rights and certain related properties in exchange for all its outstanding capital stock (R. 11-12). The Greyhound Corporation ("Greyhound"), which at the time of the application controlled Pacific through ownership of a majority of its capital stock (R. 9),² would acquire concurrent control of Golden Gate and of the operating rights and properties to be acquired by it as a result of the transaction.

The purpose of the transaction is to resolve a number of recurring problems arising from the operation of this largely local commuter service by Pacific in conjunction with its intercity long-haul operations (R. 19-21). In approving the transaction as consistent with the public interest, the Commission found that the local and intercity operations differ with respect to the nature of the services provided, the type of passenger carried, the mileage involved, and the type of equipment used; that Pacific's public relations had suffered because of labor problems arising primarily from the local operations; and that Pacific's management has had to devote more time and energy to those operations than are commensurate with the comparative traffic and revenue producing results of that service (R. 27-28). It found that the same service

² Pacific Greyhound and Greyhound have since been merged.

now rendered by Pacific would be provided by Golden Gate; that the same facilities would be available; and that interstate passengers would, as now, have the option of riding on either intercity or local buses where the routes coincide.

Based on these and other findings, the Commission concluded: "A new corporation with a completely separate management, experienced in 'local' mass transportation, will be able to confine its attention to that service and thus conduct those operations more efficiently than the present management, whose main interests are concerned with the long-haul operations.

* * * As Golden Gate's management would be more familiar with local conditions and more disposed to study the particular needs of its patrons, the probabilities of adjustments to provide better service and eliminate causes of any existing complaints would be increased. Ultimate integration into the contemplated rapid transit system should be facilitated" (R. 28-29).

The Commission approved the proposed transaction as consistent with the public interest, on terms and conditions which provided, among other things, that Pacific increase its cash payment to Golden Gate by \$100,000, to a total of \$250,000; that certain duplicating operating rights of Pacific be cancelled; that Golden Gate amortize within a three-year period the amount assigned to its "Other Intangible Property" account as a result of the transaction, and that the Commission reserve jurisdiction for a period of two years in order to make such additional findings and to

impose such terms and conditions as may be necessary to protect the rights of affected employees (R. 31-32).

Before the Commission, appellants and representatives of affected employees vigorously asserted that the proposed transaction would not be consistent with the public interest. The report indicates that the Commission carefully considered these grounds of objection and found them not to be persuasive (R. 23-30). The same parties also urged that because Golden Gate was not, at the time, an existing carrier, the transaction was not one over which the Commission had jurisdiction under Section 5 (2) (a) of the Act (R. 22-23).

The complaint asking that the Commission's order be set aside raised only the jurisdictional issue. After the United States and the Commission had filed an answer and a motion for judgment on the pleadings, and after the intervening appellees had filed a motion to dismiss the complaint for failure to state a cause of action, the matter came on for oral hearing before the three-judge court on February 23, 1956. During this argument appellants' counsel for the first time indicated an intention to seek leave to amend the complaint in order to challenge the Commission's findings of fact, stating that permission to amend would be sought "in the event the determination of the Court should be against us on the legal question" (R. 101). The motion for leave to amend, which was filed five days later, was orally argued before the court on April 20, 1956.

In its opinion of April 12, 1957, the court held that the complaint should be dismissed and that the motion to amend the complaint should be denied (R. 111-118). In a separate opinion, Judge Harris concurred in the decision sustaining the jurisdiction of the Commission but dissented from the refusal to grant appellants permission to amend their complaint (R. 119-124). Subsequently judgment was entered dismissing the complaint with prejudice (R. 124-125).

SUMMARY OF ARGUMENT

I

Under the terms of Section 5 (2) (a) of the Interstate Commerce Act, Commission approval is required where a motor carrier seeks to acquire control of another motor carrier (except where not more than 20 vehicles are involved). Other provisions of Section 5 make it plain that the Commission's jurisdiction extends to acquisitions of control however the result is attained, and covers carriers participating in or resulting from the transaction. Accordingly, the Commission properly concluded, as the court below unanimously held, that its approval was required of a transaction whereby Pacific sought to transfer certain of its interstate and intrastate operating rights to Golden Gate, over which it would simultaneously obtain control through acquisition of all of Golden Gate's capital stock.

The decisions of this Court establish that jurisdiction under Section 5 embraces the control relationships resulting from consummation of the proposed trans-

action. Since admittedly Pacific will acquire control of Golden Gate, another carrier, it is immaterial that Golden Gate was not an existing carrier prior to the transaction or that the operating rights involved may have been held previously by Pacific.

The long-standing consistent administrative construction of Section 5 by the Commission, that it applies to transactions involving the segregation of dissimilar services into separate but wholly-owned subsidiary companies, is entitled to great weight. In addition, the conclusion that the section is not limited to transactions between existing carriers, but applies as well to transactions which will result in one carrier acquiring control of one which comes into existence by reason of the transaction, finds support in the judicial decisions construing comparable control provisions of the Civil Aeronautics Act.

The fact that in the instant case the operating rights involved are for the most part the local commuter rights of Pacific in the San Francisco Bay Area does not detract from the Commission's jurisdiction to approve the whole transaction under Section 5. Section 5 (11) provides that the authority conferred upon the Commission shall be exclusive and plenary and that upon approval of the Commission the transaction may be carried into effect without invoking any approval under State authority. This Court has recognized that by reason of this provision the Commission's jurisdiction extends to approving a transaction even though contrary to state law, *Seaboard R. Co. v. Daniel*, 333 U. S. 118; *Schubacher*

v. *United States*, 334 U. S. 182. Moreover, as the Commission has consistently recognized, the existence and exercise of jurisdiction to approve the entire transaction covering both intrastate and interstate operating rights is essential in order that carriers may not accomplish by indirection or in piecemeal fashion results which they could not lawfully accomplish directly.

II

The court below clearly did not abuse its discretion in denying appellants' motion to amend their complaint under Rule 15 (a) of the Federal Rules of Civil Procedure. While this Rule is to be construed liberally, such a motion is not to be granted as a matter of course, but only "when justice so requires."

Appellants expressly disavow any negligence or inadvertence and assert, in substance, that, in the absence of a showing of prejudice to other parties, it is an abuse of discretion for a district court to deny permission to amend at any time and for any purpose, even though the change represents an entirely new theory of action. On the contrary, the interests of justice would not be served by a construction of Rule 15 (a) which would permit *seriatim* attacks on Commission orders without any showing of lack of knowledge, mistake, inadvertence or other justification. Cf. *Grubb v. Public Utilities Commission*, 281 U. S. 470. *Schick v. Finch*, 8 F. R. D. 639, 640 (S. D. N. Y.). Such a construction would result in prejudicial delays contrary to the statutory policy that Commission orders be reviewed speedily. *United States v. Griffin*, 303 U. S. 226.

ARGUMENT

I

THE COMMISSION HAD JURISDICTION OVER THE TRANSACTION UNDER SECTION 5 OF THE INTERSTATE COMMERCE ACT.

A. THE LANGUAGE AND PURPOSE OF SECTION 5 REQUIRE THAT IT BE APPLIED TO THIS TRANSACTION

Section 5 (2) (a) of the Interstate Commerce Act provides in relevant part that it shall be lawful, with the approval and authorization of the Commission, "for any carrier * * * to acquire control of another through ownership of its stock or otherwise * * *." Both the Commission and the court below found that a transaction whereby a carrier (Pacific) proposed to transfer part of its interstate and intrastate operating rights to a non-carrier (Golden Gate), which thereupon would become a carrier, and, in exchange, would concurrently acquire control of the latter through acquisition of all its outstanding stock, required approval by the Commission under Section 5 (2) (a). It is submitted that such a transaction falls squarely within the language of Section 5 (2) (a) and that Commission approval of such a transaction is necessary if it is to "control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system." *Schwabacher v. United States*, 334 U. S. 182, 192.

Essentially, the attack made on the Commission's jurisdiction in this case is that Golden Gate is not an existing carrier and that Section 5 (2) (a) applies

only to mergers, consolidations or acquisitions of control of carriers already in existence. While no such restriction appears in the language of the statute; it is said that such a construction is required by its legislative history.

In determining the jurisdiction of the Commission under Section 5 (2) (a), however, the test, as every relevant Commission report and court decision makes plain, is the control relationships which will result from carrying out the terms of the *proposed transaction*. If the result of a proposed transaction will bring about any of the various control relationships described in Section 5 (2) (a), then jurisdiction attaches. This is true no matter what the status of the parties might have been prior to the transaction.

This Court has considered the scope and purpose of Section 5 on a number of occasions. While none of these cases has involved an acquisition of control resulting from a segregation of operating rights into a fully-controlled subsidiary, they clearly hold that jurisdiction under Section 5 depends upon the relationship which will exist upon consummation of the proposed transaction.

In these cases, the jurisdictional question has involved whether there could be an acquisition of control within the meaning of that phrase in Section 5 (2) (a) where, by reason of pre-existing relationships, one carrier already enjoys substantial control over another through stock ownerships or subsidiaries. The issue was whether upon consummation of the proposed transaction any new or additional control

would result. Thus in *New York Central Securities Corp. v. United States*, 287 U. S. 12, the Court held that a transaction involving a proposed lease of carrier properties already subject to the control of the applicant through stock ownership constituted an acquisition of control within the meaning of Section 5. In *United States v. Marshall Transport Co.*, 322 U. S. 31, it was held that a transaction which would result in a non-carrier obtaining control of another carrier through an acquisition by a carrier already controlled by the non-carrier required the non-carrier to obtain approval of the Commission under Section 5. In applying Section 5 to such a proposed transaction, the Court said (322 U. S. at pp. 38-39):

It [the statute] has in the broadest terms prohibited the effectuating of "control or management * * *, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company * * *, or in any other manner whatsoever." § 5 (4). "Control or management" is defined to include "the power to exercise control or management." § 5 (4). The control or management whose acquisition is prohibited unless the approval of the Commission is secured is that which is obtained "in any * * * manner whatsoever" "however such result is attained, whether directly or indirectly," § 5 (4). It includes "actual as well as legal control," § 1 (3) (b), and "the power to exercise control or management," § 5 (4).

Looking again to the end result, this Court recently held in *Alleghany Corp. v. Brswick & Co.*, 353 U. S.

151, that the proposal to merge the Jeffersonville into the Big Four, even though the Big Four owned all of the stock of the Jeffersonville, constituted an acquisition of control requiring Commission approval under Section 5 (2) (a).

In all these cases, in determining the jurisdictional question, the Court took into consideration the pre-existing relationships solely for the purpose of determining whether there would be created a new relationship requiring the Commission's approval. In each case it found that by reason of what was proposed there would be an acquisition of control upon consummation of the proposed transaction. Precisely the same test applies here, and Commission approval under Section 5 (2) (a) is required because when the transaction is carried out Pacific will acquire control of Golden Gate, a new but separate carrier.

There is no suggestion in Section 5 that the Commission's jurisdiction to approve or disapprove control relationships is limited by the method by which or the time at which such control relationships are created. On the contrary, all that Section 5 provides is that if, as in the instant case, the transaction will result in one carrier acquiring control of another, Commission approval is required. That Section 5 (2) (a) is not restricted in its application to carriers already in existence or to any particular method of acquiring control is made plain when the provisions of Section 5 are considered as a whole.

Section 5 (2) (a) described what may lawfully be done with Commission approval. However, in determining what may lawfully be accomplished with

Commission approval, it is appropriate to look to what is made unlawful if accomplished without its approval, where, as here, the matter is dealt with in a separate provision. *United States v. Marshall Transport Co., supra*. This is particularly true where a remedial regulatory statute is involved and there is no suggestion that Congress sought to withhold from the Commission jurisdiction to approve any transaction which, if effected without its approval, would be unlawful.

Section 5, paragraph (4), declares that it shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a), or to accomplish or effectuate or to participate in accomplishing or effectuating the control or management in a common interest of any two or more carriers, *however such result is attained*. Unless it is concluded that under Section 5 (2) the Commission has authority to approve an acquisition of control of one carrier by another, however that result is obtained, paragraph (4) renders unlawful conduct done without Commission approval which the Commission, charged with regulating the industry, is without authority to grant even if it finds the proposal consistent with the public interest. There is no indication anywhere that such a result was contemplated, and the phrase "except as provided in paragraph (2)" clearly indicates that under paragraph (2), the Commission has authority to approve any transaction made unlawful by paragraph (4). In this connection, it should be noted

that the Commission, in its report in the instant case, called attention to the fact that "if the transaction were accomplished without prior authority it would be in violation of section 5 (4)" (R. 22-23).

The broad reach of Section 5 (2) is further confirmed by Section 5, paragraph (5), which provides that for the purposes of Section 5 "but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier * * *." It would be difficult to conceive of language which points more directly to the ultimate result of a proposed transaction as the yardstick for measuring jurisdiction.

Insofar as related provisions of the statute support the jurisdiction of the Commission under Section 5 (2) (a) to approve transactions involving both existing and resulting carriers, Section 5 (14) is most significant. This provision, which is discussed more fully below, provides in part that the authority conferred by Section 5 "shall be exclusive and plenary, and *any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power * * * to carry such transaction into effect * * * without invoking any approval under State authority * * **" (Emphasis added.) The italicized language makes it

clear that the Commission's jurisdiction under Section 5 (2) (a) is not limited to transactions between existing carriers, but includes persons who will become carriers as a result of such transactions. As the Court below held (R. 113):

We have no difficulty in finding that the proposed transaction is covered by the language of the section; it merely says that approval of the Commission is required when one carrier acquires control of another. That is precisely what the Greyhound Corporation and Pacific are seeking to do here; although Golden Gate will not attain the status of a carrier until the operating rights of Pacific are transferred to it, neither will the parent corporations acquire control until then, for the properties and operating rights are to be simultaneously exchanged for the stock.

B. SUCH A CONSTRUCTION OF SECTION 5 IS SUPPORTED BY THE COMMISSION'S CONSISTENT ADMINISTRATIVE INTERPRETATION SINCE 1940

The Commission's jurisdictional ruling in this proceeding does not represent any new departure; rather it is a reaffirmation of a construction of Section 5 repeatedly made since 1940 in a number of proceedings involving transactions seeking Commission approval to segregate substantially dissimilar operations into separate but controlled companies. *Columbia Motor Service Co.—Purchase—Columbia Terminals Co.*, 35 M. C. C. 531 (1940), which the Commission cited in its report (R. 23), involved applications for authority for Columbia Terminals Company to acquire the

capital stock of Columbia Motor Service Co., a new corporation, and for the latter to acquire from Terminals certain property and interstate and Missouri intrastate contract carrier operating rights. The purpose of the transactions was to enable Terminals to segregate in separate companies its common carrier and contract carrier operations, and thereby remove the objections of Missouri officials to conduct of common carrier and contract carrier operations by a single operator. The Commission held that this matter was within its jurisdiction under Section 5 (2), stating as follows (pp. 534-535):²

As the proposed purchase by Motor Service of the previously described motor-carrier properties of Terminals and the contemporaneous acquisition of control of the former by the latter are in reality a single transaction, involving acquisition of control of a motor carrier through stock ownership; the matter is subject to our prior approval under section 213, and our findings relate to the entire transaction. Compare *Boyle Bros., Inc.—Control—Speedway Transp. Co., Inc.*, 35 M. C. C. 45, and *Clardy—Control—Bulk Haulers, Inc.*, 35 M. C. C. 93.

* * * * *

Under the proposed transaction, dual operations formerly conducted by a single entity, and found by division 5 to be consistent with the

² Prior to 1940, acquisitions of motor carriers were governed by Section 213 of the Interstate Commerce Act. By the National Transportation Act of 1940, 54 Stat. 898, Section 213 was deleted, and all acquisitions, regardless of the type of carrier, were put under Section 5, which originally applied only to railroads.

public interest within the meaning of section 210, would henceforth be performed by separate companies under common control. To this extent, what is proposed is not in accord with our policy to encourage corporate simplification wherever possible. However, since the arrangement appears to afford the only practicable solution for elimination of continued conflict with the Missouri authorities, and otherwise appears to be consistent with the public interest, under the circumstances here present the transaction will be approved.

Similarly, in *Consolidated Freightways, Inc.—Control—Consolidated Convoy Co.*, 36 M. C. C. 358 (1941), Freightways was authorized to transport general commodities and automobiles and trucks in truck-away and drive-away service. Freightways sought and obtained approval of the Commission for acquisition of control through stock ownership of Convoy, a new corporation, which would acquire and conduct the truck-away and drive-away business. The Commission noted (p. 360) the managerial factors prompting the proposed transactions:

The truck-away and drive-away operation is a specialized service, and, as stated, it has been conducted separately from Consolidated's gen-

³ Appellants' supplemental brief refers to the fact that subsequent to this proceeding authority was sought from the Missouri Commission to transfer the intrastate operating rights involved. While we discuss this aspect of the case more fully *infra* at pp. 25-33, Section 5 (11) expressly relieves a carrier from seeking such approval. Moreover, there is nothing in the Missouri Commission order to indicate that what was involved was anything other than a formal transfer designed to give state recognition to the already consummated sale.

eral-commodity operation. Different types of equipment are used, and separate offices have been maintained. The bulk of such business is with one automobile manufacturer. In such operation, leased vehicles, driven by their owners, are generally used, and, as the owner-drivers' compensation is computed on a basis different from that of other drivers, difficulty has been experienced with union drivers employed in the general-commodity operation. * * *

In approving the transactions, the Commission held (p. 359):

As the proposed purchase and contemporaneous acquisition of control are in reality a single transaction, involving acquisition of control of a motor carrier through stock ownership, the matter is subject to our prior approval under section 5, and our findings relate to the entire transaction. Compare *Columbia M. Service Co.—Purchase—Columbia Terms. Co.*, 35 M. C. C. 531.

In *Takin—Purchase—Takin Bros. Freight Line, Inc.*, 37 M. C. C. 626 (1941), the Commission held that it had jurisdiction over a transaction which involved the purchase by a non-carrier partnership of certain operating rights from a corporation controlled by the partnership. The Commission stated (p. 627):

As above indicated, the partnership does not engage in transportation in interstate or foreign commerce and is therefore not a motor carrier within the meaning of the act. However, consummation of the instant transaction would make it such a carrier owned equally by Blanche and L. J. Takin, who would continue to control

the corporation through stock ownership. Under the circumstances, the transaction is one requiring our prior approval under section 5. Compare *Columbia M. Service Co.—Purchase—Columbia Terms. Co.*, 35 M. C. C. 531, and *United Parcel Service of Portland—Purchase—Wiese*, 37 M. C. C. 473.

In substance, the transactions involved in the *Takin* case also involved the segregation, for managerial reasons, of intrastate operations in the partnership and interstate operations in the corporation.

A similar situation was involved in *Gehlhaus and Hollobinko—Control*, 60 M. C. C. 167 (1954), in which corporation A was engaged in both motor carrier and water carrier operations. Acting under Section 5, the Commission approved A's acquisition of control through stock ownership of corporation B and A's transfer to B of its motor carrier operating rights and assets to be used by B in conducting the motor carrier operations. In its report, the Commission referred to the business considerations prompting these transactions as follows (p. 170):

The performance of both types of service by Boat Line has resulted in some confusion to the traveling public, more particularly with respect to the motor-carrier operations. The dual service by the same carrier has also resulted in various other complications, including the maintenance of separate accounting records and in personnel management relations. Difficulty has been encountered in properly apportioning expenses between the separate divisions. Applicants' stockholders and offi-

cials believe that separation of the motor-carrier functions from those relating to the water-carrier operations, as here proposed, would tend to eliminate existing confusion, permit more efficient management, and result in an improved bus and water-carrier service.

As to its jurisdiction to approve these transactions, the Commission held (p. 169) :

The proposed purchase and contemporaneous acquisition of control of Bus Line through the acquisition of its capital stock by Boat Line are in reality a single transaction, involving the acquisition of control of a motor common carrier by another carrier, and the matter is subject to our prior approval under section 5, and our findings relate to the entire transaction. Compare *Consolidated Freightways, Inc.—Control—Consolidated*, 36 M. C. C. 358, *Hogshire—Control—N. B. & C. Motor Lines, Inc.*, 35 M. C. C. 33, and *Stearns—Control—Massachusetts SS. Lines, Inc.*, 45 M. C. C. 647.

In brief, the Commission has consistently held that Section 5 requires its approval of transactions which will result in one carrier acquiring control of another carrier. The Commission has repeatedly exercised this jurisdiction under Section 5 to approve the acquisition of control of one carrier by another where the intended result of the transaction was to segregate for obvious managerial reasons different types of transportation operations. In this case, as in its prior decisions discussed above, the Commission has recognized the advantages of separate management for different types of transportation operations as a

valid ground for the exercise of its powers under Section 5 (2) (b). The Commission's consistent construction of Section 5 is both reasonable and conducive to fostering an efficient national transportation system. This Court has recognized that such an interpretation by the agency charged with the day-to-day administration of the Interstate Commerce Act is entitled to great weight. *United States v. American Trucking Associations*, 310 U. S. 534, 549.

C. JUDICIAL DECISIONS UNDER COMPARABLE PROVISIONS OF THE CIVIL AERONAUTICS ACT SUPPORT THE COMMISSION'S JURISDICTION HERE

The Commission's view that Section 5 is not limited to transactions between existing carriers, but applies as well to transactions which, when consummated, will result in one carrier acquiring control of another, finds strong support in judicial decisions under comparable provisions of the Civil Aeronautics Act. Section 408 of that Act (49 U. S. C. 488) provides in part:

(a) It shall be unlawful, unless approved by order of the Board as provided in this section—

* * * * *

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever; * * *

Section 408 (b) provides that any person seeking approval of a transaction specified in subsection (a) shall present an application to the Board.

In *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F. 2d 810 (C. A. 2, 1941), review was sought of an order of the Civil Aeronautics Board, which granted an application of American Export Airlines, Inc., for a certificate of public convenience and necessity for temporary air transportation between the United States and Lisbon, but dismissed that part of the application which sought the Commission's approval under Section 408 (b) of the Civil Aeronautics Act of the control of applicant by its parent American Export Lines, Inc. (a steamship corporation). American Export Lines was a common carrier and owned seventy percent of the stock of American Export Airlines. The latter proposed to engage in business as an air carrier but was not an air carrier when it filed application with the Board asking for approval of its control by American Export Lines, if such approval were deemed necessary. The Board dismissed the application upon the ground that Section 408 (a) (5) "applies to cases involving the control of air carriers only where the acquisition of control of a corporate entity occurs at a time when that entity is already an air carrier." The Court of Appeals for the Second Circuit, in an opinion written by Judge Augustus N. Hand, rejected this interpretation of the statute as one that was too literal and would defeat the statutory objectives. The court stated (p. 815):

This seems to us an unduly literal interpretation of subdivision (5). In our opinion "to acquire control of any air carrier in any manner whatsoever" is to take all steps involved

in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources, with a certificate authorizing operation. Any other interpretation would enable a steamship company, by organizing a subsidiary for air carriage, to escape the requirement of Section 408 (b) that the "Authority shall not enter * * * an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carriage to use aircraft to public advantage in its operation and will not restrain competition."

The court therefore concluded (p. 816) that "the Board ought not to have dismissed the application but should have proceeded to deal with it on the merits."

In *National Air Freight Forwarding Corp. v. Civil Aeronautics Board*, 197 F. 2d 384 (C. A. D. C., 1952), the court reached a similar determination that the statute confers on the Board jurisdiction, not only over a carrier that is seeking control of another carrier already in existence, but also over all the steps preliminary to bringing this second carrier into existence. In this case, National Air Freight Forwarding Corp. attacked that part of the Board's order which denied it operating authority as a freight forwarder on the ground that it was controlled by a railroad. In upholding the Board and rejecting the contention of the petitioner that Section 408 was inapplicable since this was not the case of a common carrier acquiring control of an air carrier, because the control was

acquired of a company simply established to become an air carrier, the court stated (p. 386):

While there is no doubt that § 408 applies where a common carrier acquires control of an established air carrier, the parties dispute its application where, as here, control is acquired of a newly organized company applying to enter the air transportation field for the first time. Since such a company is not an air carrier until a certificate has been issued, it would appear at first blush that its relationships to other types of carriers are not subject to the restriction of § 408. It has been held, however, in *Pan American Airways Co. v. Civil Aeronautics Board*, 2 Cir., 1941, 121 F. 2d 810, that the very process of certification brings the control relationships between the newly certificated air carrier and its parent within § 408. Otherwise a common carrier seeking entry into the air transportation field would be able to evade § 408 merely by organizing a subsidiary and causing it to apply for a certificate of public convenience and necessity under § 401. We agree with the Pan American decision that it would be unwise for the Board to close its eyes to the fact that with completion of the certification process, there would be in existence an air-surface carrier control relationship which important segments of the Act were designed to regulate.

Appellants' attempt to distinguish the rationale of these cases will not stand analysis. On the contrary, as the court below pointed out (R. 116): "The reasoning of Judge Hand is equally applicable here." Concededly different considerations apply to different

modes of transportation in determining whether a particular merger or acquisition of control is consistent with the public interest. But whatever these factors may be, the common purpose of these comparable provisions is to subject such acquisitions to the prior approval of the appropriate regulatory agency. And in this connection, the courts held there was jurisdiction under Section 408 where the carrier sought to be controlled would become an air carrier only upon consummation of the transaction.⁴ It is under precisely the same reasoning that the Commission ruled it had jurisdiction in the instant proceeding under Section 5 (2) of the Interstate Commerce Act.

D. THE COMMISSION'S JURISDICTION UNDER SECTION 5 EXTENDS TO BOTH THE INTRASTATE AND INTERSTATE OPERATIONS OF A CARRIER

In the preceding parts we have shown that, under Section 5 (2) (a), Commission approval is required of a proposed transaction whenever it appears that upon consummation one carrier will acquire control of another. In this part, we consider appellants' general contention that the Commission is without authority to approve this transaction because mostly intrastate rights are involved which are subject to state supervision and control. Not only is appellants' reliance

⁴ The portion of Section 408 (b) referred to in appellants' brief (p. 42) applies only to applicants, that is, the party seeking control, and therefore has no bearing in determining whether the party to be controlled is or will be an air carrier upon consummation of the transaction — the issue before the courts in the CAB cases discussed above.

on Section 212 (b) misplaced, but essentially the argument advanced constitutes an attack on the Commission's findings to support its conclusion that the proposed transaction is consistent with the public interest, an issue not before this Court.

The transactions approved by the Commission involve the transfer to Golden Gate of Pacific Greyhound's intrastate operating rights as well as the transfer of the related interstate rights. The Commission recognized that in this case the intrastate rights are predominant. But in the absence of some legislative limitation, the question of jurisdiction under Section 5 does not turn on some arbitrary formula pertaining to the amount of the intrastate versus interstate operations involved. Indeed, appellants concede (Br. 29) that "If Golden Gate were presently conducting the operations in question, and if it were to go to the Interstate Commerce Commission with a plan for merger or consolidation with Pacific Greyhound, the proposal would fall squarely within the purpose and language of Section 5 (2)".

Section 5 (2) (a) gives the Commission jurisdiction over acquisitions of control of carriers subject to the Interstate Commerce Act without any limitation of that jurisdiction to interstate operations. If the Act said nothing more, the practical impossibility of separating the interstate and intrastate operations of many carriers would preclude reading such a limitation into Section 5 (2) (a). However, the matter is made crystal clear by Section 5 (11), which not only provides generally that "The authority conferred by

this section shall be exclusive and plenary", but specifically commands that:

* * * any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. * * *

Thus, Section 5 (11) provides in terms that the parties to transactions approved by the Commission under Section 5 may operate properties and exercise franchises acquired in such approved transactions without regard to any restrictions or prohibitions of state or municipal law which might be applicable in the absence of such approval. This language would be meaningless unless it referred to state or municipal franchises.

to conduct intrastate operations, since interstate operating rights would not be subject to local law in any event. It follows, from the statutory language alone, that the Commission had authority to approve or disapprove the acquisition by Golden Gate of Pacific's intrastate rights.

Moreover, this Court has recognized that, by reason of Section 5 (11), where jurisdiction attaches under Section 5 (2) (a), the transaction may be consummated in a manner inconsistent with state law, even though it may affect matters normally committed to state control. In *Seaboard R. Co. v. Daniel*, 333 U. S. 118, this Court, in sustaining a Commission order authorizing a Virginia corporation to acquire a railroad system in six states, including South Carolina, held that the Commission's order relieved the Virginia corporation from compliance with the laws of South Carolina forbidding the ownership of railroads in the state by foreign corporations. In *Schwabacher v. United States*, 334 U. S. 182, which likewise dealt with the effect of state laws in Section 5 proceedings, the Commission had approved, pursuant to Section 5 (2), the voluntary merger of the Pere Marquette Railway Company, a Michigan corporation, and the Chesapeake & Ohio Railway Company. The order was attacked by certain preferred stockholders of Pere Marquette, who maintained that the terms of the merger did not accord them rights granted by the corporate charter and pertinent state law. The Commission took the position that the merger terms were just and reasonable as to all stockholders and

that if such terms deprived any stockholders of contract rights which they had under the railroad's charter and the law of Michigan, such stockholders would have to seek redress in the Michigan courts, since the Commission could not determine the legal rights of the stockholders. This Court held that the Commission had construed too narrowly the relief provided by Section 5 (11), that approval of a merger under Section 5 is not conditioned upon observance of state laws, and the Commission may not grant approval which is contingently subject to rights given by state law. The Court said that when the conditions prescribed by Section 5 are met, that is, that the transaction be consistent with the public interest, be just and reasonable, and the required number of stockholders have approved, "the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of 'restraints, limitations, and prohibitions of law, Federal, State or municipal * * *'."

334 U. S. at 194-195. And compare *Texas v. United States*, 292 U. S. 522, where a similar conclusion was reached under the immunity provision in Title II of the Emergency Railroad Transportation Act of 1933.

With respect to the power of the Commission to approve transfers of intrastate rights which are involved in a transaction coming under Section 5, *New England Greyhound Lines v. Powers*, 108 F. Supp. 953 (D. R. I.) is significant. There the court held that the Interstate Commerce Commission had authority to approve the purchase by one carrier of both the

interstate and intrastate operating rights of another carrier, even though the acquisition of the intrastate rights was expressly forbidden by state law. New England Greyhound Lines and its parent Greyhound had obtained from the Commission, pursuant to provisions of Section 5, authority to acquire both the interstate and intrastate operating rights of another carrier. Following the acquisition, New England Greyhound applied to the state authorities of Rhode Island for approval of the transfer of the intrastate certificate from the vendor to it, but the application was disapproved on the ground that the constitution and general laws of Rhode Island prohibit the holding of an intrastate certificate by a corporation which is not specially chartered by an act of the Rhode Island General Assembly. New England Greyhound subsequently filed an action for declaratory judgment to remove the cloud on its right to the intrastate certificate. In granting judgment for the plaintiff, the court held that once the Commission had approved the acquisition of the interstate and intrastate operating rights, no state laws could override the determination of the Commission. In so holding, we submit that the district court correctly applied the rationale of this Court's decisions in *Texas v. United States, Seaboard R. Co. v. Daniel*, and *Schwabacher v. United States, supra*.

Under the principle announced in those cases, it is clear that the Commission had full authority to approve or disapprove the acquisition by Golden Gate of the intrastate rights of Pacific Greyhound, even

assuming that there are state laws which prohibit such an acquisition or require permission from the state for transfer of the rights. Indeed, the Commission has held consistently that where a transaction is subject to Section 5 (2) the Commission's plenary jurisdiction covers both interstate and intrastate operating rights. Such a construction of Section 5 is compelled not only by the language of paragraph (11) but also by the practical necessities of effective regulations in the public interest. If the Commission's jurisdiction over a sale and purchase were confined to the interstate rights, the Commission could not properly determine whether the terms of the transaction considered as a whole were reasonable, the effect of the transaction on the purchaser's financial stability, the consequence of the transaction on adequate and economical transportation in the territory, and other matters affecting the public interest. Furthermore, if the Commission did not have jurisdiction over the sale and purchase of intrastate operating rights, such transactions could be used as vehicles for a carrier to obtain a monopoly in interstate operations without power in the Commission to prevent this. For example, if two carriers had duplicating interstate rights, one of them could secure a monopoly without the Commission's approval by the device of acquiring the intrastate rights and physical properties of the other and by the latter agreeing to abandon its interstate operations.

The Commission set forth its interpretation of Section 5 in *Wilson Storage & Transfer Co.—Purchase—*

Dakota Transp., 36 M. C. C. 221 (1940). There two interrelated contracts, one for the purchase of the vendor's interstate rights and the other for the purchase of his corresponding intrastate rights, provided that the vendor should continue its interstate operations until Commission approval of the transaction was obtained, but that the entire purchase price should be paid upon approval of the transfer of the intrastate rights by the appropriate state authorities. As soon as the state authorized transfer of the intrastate rights, the vendee paid the entire purchase price and commenced intrastate operations, and the vendor continued its interstate operations. The Commission held that since it had jurisdiction over all of the transaction, consummation of a part was illegal. It said (pp. 226-227):

It is evident that the two instruments above described embrace a single transaction. It is also apparent that the parties have consummated that portion of the transaction relating to purchase of the intrastate operating rights in advance of approval of the transaction by us, under the erroneous impression that such consummation might lawfully be effected. We are of the opinion that our jurisdiction under section 5 extends to the entire transaction and to all of the "properties" covered by such transaction and not alone, as the parties here apparently believed, to the purchase of rights to operate in interstate or foreign commerce; and that no part of a transaction, when such transaction is subject to the requirements of section 5, may lawfully be consummated without our prior approval.

In *Buckingham Transp. Co. of Colo., Inc.—Purchase—Fast Frt.*, 36 M. C. C. 313 (1940), the Commission reaffirmed its construction of Section 5 in rejecting the contention of the carriers that the Commission lacked jurisdiction over the intrastate rights which were involved. In that case, Buckingham Transportation Company and the Fast Freight Lines entered into two contracts, one covering purchase of the vendor's intrastate rights and the other purchase of its interstate rights. The transfer of the intrastate rights was approved by the appropriate authorities. The Commission, however, disapproved the transaction *in toto* on the ground that it was not consistent with the public interest and rejected the contention that it lacked jurisdiction over the purchase of the vendor's intrastate rights. Referring to Section 5 (11), and the *Wilson Storage* case, the Commission stated (p. 317):

It is apparent that applicant has unlawfully consummated purchase of all of the properties of vendor, a motor carrier; and, with respect to applicant's contention as to the limits of our jurisdiction, we are of the opinion that our jurisdiction under section 5 extends to the purchase transaction in its entirety, including all of the operating rights and properties concerned, and not solely to purchase of interstate operating rights.

See also *Raymond Bros. M. Transp., Inc.—Purchase—North American*, 37 M. C. C. 431; *Takin—Purchase—Takin Bros. Freight Line, Inc.*, 37 M. C. C. 626.

These cases serve to demonstrate the inapplicability of Section 212 (b) to a transaction which involves not only the transfer of interstate and intrastate operating rights but also the simultaneous acquisition of control of one carrier by another carrier. That Section provides: "Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe." However, under Section 5 (2) and (10) such an acquisition of control of one carrier by another would be governed by Section 212 (b) only if the aggregate number of vehicles involved did not exceed 20, which is not the case here. *United States v. Resler*, 313 U. S. 57.

Appellants concede that the Commission could not have approved the instant transaction under Section 212 (b). We agree. But it does not follow that there is a void in regulatory authority. On the contrary, as this Court pointed out in the *Resler* case, the two sections must be read together, and when this is done it is plain that they confer jurisdiction on the Commission to approve every kind of transaction which may involve the transfer of operating certificates issued by it. Section 212 (b) was designed to cover less complicated transactions, essentially small ones, *Stearn v. United States*, 87 F. Supp. 596, 602 (D. C. W. D. Va.). In such cases, the Commission may establish reasonable rules and regulations not necessarily containing all of the detailed conditions in Section 5. However, an applicant for authority under Section 212 (b) has the burden of establishing that the

transaction is not subject to the provisions of Section 5. *Dean and Dove—Purchase—Dean*, 51 M. C. C. 376, 381.

On the other hand, transactions *not* falling under 212 (b) are covered by Section 5. As the Commission observed in *Atwood's Transport Line—Lease—John A. Clarke*, 52 M. C. C. 97, 107-108:

* * * Section 5 is principally concerned with the bringing of two or more carriers under control or management in a common interest. * * * It is for the Congress to enact legislation, and it has seen fit to draw a definite line of distinction between transfers of certificates *not involved in a transaction which is subject to section 5*, and the control of two or more motor carriers of sufficient size to be subject to section 5, where the transfer of a certificate may be involved. [Emphasis added.]

Since Pacific will admittedly acquire control of Golden Gate and of the substantial operating rights which it will possess upon consummation of the proposed transaction, it is clear that the Commission properly exercised jurisdiction under Section 5.

Finally, with respect to the jurisdictional issue, we observe that in large measure, appellants' argument constitutes an attack on the adequacy of the Commission's findings to support its order on the merits. We refrain from commenting on these contentions, since the complaint raised only the jurisdictional question, and the record before the Commission is not before the Court. "The settled rule is that the findings of the Commission may not be assailed in

the absence of the evidence upon which they were made." *Mississippi Valley Barge Lines Co. v. United States*, 292 U. S. 282, 286.

II

DENIAL OF THE MOTION TO AMEND THE COMPLAINT WAS NOT AN ABUSE OF DISCRETION

The appellants also contend that the district court abused its discretion in denying their motion for leave to amend their complaint in order to challenge the Commission's finding that the transaction between Pacific and Golden Gate was consistent with the public interest. The motion was made under Rule 15 (a) of the Federal Rules of Civil Procedure which provides in relevant part that "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

The contested ruling by the court must be considered in the context of this proceeding. Before the Commission, appellants, who have been represented by the same attorney throughout, objected to grant of the application involved in this appeal on the grounds that the proposed transaction (1) was not within the scope of Section 5, and, (2) was not consistent with the public interest. After the Commission had issued its report and order granting the application, appellants were free to seek judicial review of the jurisdictional ruling, the ruling on the merits, or both;

but the complaint which they filed raised only the jurisdictional question. After an answer to the complaint and cross motions for judgment on the pleadings had been filed, the jurisdictional issue was argued before the three-judge district court. In the course of this argument, appellants' counsel for the first time stated that he desired leave to amend the complaint to challenge the Commission's "public interest" determination in the event the court should rule against appellants on the jurisdictional issue.

Appellants filed their motion for leave to amend five days after argument of the jurisdictional question, and attached to the motion a proposed amendment which attacked, as lacking evidentiary support, the Commission's finding that the transactions which it approved were consistent with the public interest, and similarly challenged many of the Commission's subsidiary findings (R. 74-77). In other words, appellants proposed that a complaint limited to the question of the Commission's jurisdiction should be converted, by amendment, to an all-out assault on the Commission's action. Grant of their request would have required, at the minimum, the filing of amended answers, production of the record before the Commission, preparation of additional briefs, and further argument before the court on the questions raised by the amendment.

Under Rule 15 (a) a motion to amend a complaint after responsive pleadings are filed is addressed to the discretion of the court unless it is consented to by the adverse parties. Appellants argue, in effect,

that under this Rule justice requires that permission be granted almost as a matter of course if, on second thought, an attorney decides, when a case is ready for final disposition, to interject new issues in the event the issue originally raised is found wanting in merit. Under appellants' theory, the plaintiff does not have the burden of justifying his belated action, but the defendants have the burden of showing that they would be prejudiced by the ensuing delay or otherwise adversely affected.

While the Rule provides that leave shall be freely given when justice so requires, a motion is not to be granted as a matter of course but must be determined in the light of all the surrounding circumstances. *In re Hudson & Manhattan R. Co.*, 229 F. 2d 616, 621 (C. A. 2). In this case the last minute attempt to amend was not based on lack of knowledge, oversight or mistake, factors which the courts have consistently taken into consideration in exercising discretion under this Rule. Rather, appellants' counsel candidly acknowledged that what he sought was a bite from another apple if the first turned out to be sour. But if this is a sufficient ground for amending a complaint, the door is opened to *seriatim* attacks on Commission orders, and a technique is available for delaying the operative effect of its orders.

This Court has held that a party who had full knowledge of all the grounds upon which the order of a regulatory agency might be attacked may not prosecute his appeal in a piecemeal fashion. In

Grubb v. Public Utilities Commission, 281 U. S. 470, the primary question presented was whether the State Supreme Court decision upholding a report and order of the Public Utilities Commission of Ohio was *res judicata* in a federal district court proceeding which sought to litigate the same questions between the same parties. However, in the federal court proceeding an attempt was made to raise an issue which had not been raised in the state court proceeding. After noting that the appellant had personal knowledge of this additional factor at the time of the initial hearing before the State Commission, at the time he applied for a rehearing, and that it could also have been raised in the State Supreme Court, this Court said (281 U. S. at 478-479):

The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal; as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. [Citing cases.]

As the ground just described was available but not put forward the appellant must abide by the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also

as respects any other available matter which might have been presented to that end.

By the same token, it is submitted that under a most liberal construction of Rule 15 (a), justice does not require that litigation be conducted in a piecemeal fashion. On the contrary, as the Court said in *Schick v. Finch*, 8 F. R. D. 639, 640 (S. D. N. Y.), in denying a motion for leave to serve an amended answer:

A liberal policy does not mean the absence of all restraint. Were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave should not be granted. The instant case, I believe, falls into such a category. It is made on the very eve of trial. It proposes to change allegations which go to the heart of the issue without assigning an adequate cause for the modification. It is concerned with matters which, if true, must have been within the defendant's knowledge when the controversy arose.

See also, *Friedman v. Transamerica Corp.*, 5 F. R. D. 115, 116 (D. Del.).

Appellants attempt to assimilate their motion to amend to a situation where a court holds the allegations of a complaint insufficient to state a cause of action and thereafter permits an amendment almost as a matter of course. This approach fails to take into account that an order of the Interstate Commerce Commission is issued only after the rights of

the parties have been determined after a full hearing in an administrative proceeding. Thus, there is little similarity to the situation where, unless amendment is permitted, the plaintiff will be deprived of opportunity to have his complaint heard.

Moreover, under the Urgent Deficiencies Act, Congress provided a method of judicial review of orders of the Commission possessing, as this Court has said, "extraordinary features." *United States v. Griffin*, 303 U. S. 226, 232. The original hearing in the district court is before three judges, one of whom must be a circuit judge; from their decision a direct appeal lies to this Court; and "[u]pon both the trial court and the Supreme Court rests the obligation to give the case precedence over others." 303 U. S., at 232. As this Court observed (*id.*, at 233): "In such cases Congress sought to guard against ill-considered action by a single judge and to *avert the delays ordinarily incident to litigation*." (Emphasis added.)

The obligation to "avert the delays ordinarily incident to litigation" is a two-way street. We submit that in the circumstances of this case the district court did not abuse its discretion in refusing to permit appellants to amend their complaint.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APRIL 1958.

APPENDIX

STATUTE AND RULE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, are as follows:

SECTION 1. (3) (b) For the purposes of sections 5, 12 (1), 20, 204 (a) (7), 210, 220, 304 (b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons): such reference shall be construed to include actual as well as legal control; whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

* * * * *

SECTION 5. (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a

person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *

* * * * *

SECTION 5. (4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, how ever such result is attained, whether directly or indirectly, by use of common directors officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

SECTION 5. (5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

* * * * *

SECTION 5. (10) Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a trans-

action within the scope of paragraph (2) where the only parties to the transaction are motor carriers subject to part II (but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1 (3)), and where the aggregate number of motor vehicles owned, leased, controlled, or operated by such parties, for purposes of transportation subject to part II, does not exceed twenty.

* * * * *

SECTION 5. (11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission.

and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. * * *

SECTION 212. (b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

Rule 15 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. 2072, provides:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.